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In 2016, the U.S. Environmental Protection Agency issued a final rule under the Clean Air Act (CAA) authorizing the Agency’s regional offices to adopt a controversial practice known as administrative nonacquiescence. An agency engages in administrative nonacquiescence when it refuses to follow decisions of the federal circuit courts. While administrative nonacquiescence has a long history, recent scholarship regarding the topic is conspicuously lacking. Nonacquiescence scholarship peaked more than two decades ago in response to a notorious and now defunct nonacquiescence policy adopted by the Social Security Administration. Since that time, however, scholars have generally abandoned the topic.

This Article fills a gap in the scholarly landscape by discussing EPA’s general authority to nonacquiesce under the various environmental statutes administered by the Agency. Likewise, this Article analyzes the Agency’s recent rulemaking authorizing nonacquiescence under the CAA as well as another recent instance of Agency nonacquiescence under the Clean Water Act. Finally, this Article argues that the Agency should accommodate nonacquiescence under the many environmental statutes administered by the Agency and proposes the inclusion of several features in future Agency nonacquiescence policies to ensure fairness and consistency for regulated industry.

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Introduction

Few federal agencies have a knack for courting controversy like the U.S. Environmental Protection Agency (EPA). In the past few years alone, EPA has been at the helm of litigation over the Barack Obama Administration’s Clean Power Plan, subjected to calls for elimination by political candidates, and threatened with significant budget reductions by the Donald Trump Administration.1 However, far outside of the major headlines, the Agency has also stirred controversy through a little-known policy termed “administrative nonacquiescence.” While the Agency’s recent nonacquiescence actions may have gone largely unnoticed, they will likely have lasting implications for both EPA’s statutory authority and the development of environmental law.

Administrative nonacquiescence is the refusal of an administrative agency to apply the precedent of a circuit court of appeals to its own proceedings.2 The process of nonacquiescence begins when the agency loses an appeal in circuit court and the court’s decision sets precedent that is contrary to the agency’s nationally applicable policy.3 Most litigants who lose before a circuit court have three primary options: they can follow the court’s decision, petition for review through the en banc process, or petition for review at the U.S. Supreme Court.4 However, federal agencies have a fourth option: they may choose to ignore the court’s decision and keep administering their own policy.5 In other words, federal agencies may nonacquiesce to the circuit court’s decision.

Beginning in 1970—the year that President Richard Nixon established EPA—to 2012, EPA did not openly engage in nonacquiescence.6 As EPA’s General Counsel explained in 1987, “EPA’s general policy is to eschew [nonacquiescence]” and “the agency has avoided [nonacquiescence] as a tool of policy.”7 In 2012, however, the Agency’s position on nonacquiescence changed dramatically.

First, the Agency announced that it would not follow a U.S. Court of Appeals for the Sixth Circuit decision regarding the Clean Air Act (CAA)8 in any jurisdiction outside of the Sixth Circuit.9 In 2014, the Agency’s announcement was struck down by the U.S. Court of Appeals for the District of Columbia (D.C.) Circuit, which held that the Agency’s regulations did not allow EPA to nonacquiesce from certain circuit court decisions under the CAA.10 In response to the D.C. Circuit’s opinion, the Agency issued a final rule in 2016 amending its own regulations to “fully accommodate intercircuit nonacquiescence,” noting that “[t]he CAA does not specifically address how the agency should respond to adverse court decisions” and that such determinations should be left to the Agency.11 In June 2018, a D.C. Circuit panel upheld EPA’s amended regulations and endorsed the Agency’s authority to nonacquiesce under the CAA.12

Around the same time, EPA was also litigating a nonacquiescence case involving the Clean Water Act (CWA).13 In 2013, the U.S. Court of Appeals for the Eighth Circuit held against the Agency in a decision involving permitting rules for wastewater treatment plants under the CWA.14 EPA, mirroring its actions a year earlier under the CAA, refused to follow the Eighth Circuit’s decision outside of the Eighth Circuit, leading to another challenge in the D.C. Circuit.15 In February 2017, a D.C. Circuit panel dismissed the complaint on jurisdictional grounds, leaving the question of whether the Agency has authority to nonacquiesce under the CWA unanswered.16

Despite EPA’s emphatic embrace of its nonacquiescence authority, there is no legal scholarship focusing entirely on EPA’s ability to nonacquiesce.17 Moreover, there is very little recent legal scholarship on the issue of administrative nonacquiescence.18 Nonacquiescence legal scholarship reached a high-water mark in the late 1980s and early 1990s,19 buoyed,

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3. Id.
4. Id.
5. Id.
6. See infra Section II.B.1.
7. Estricher & Revesz, supra note 2, at 717 (quoting the authors’ summary of a discussion with EPA’s General Counsel).
10. NEDACAP I, 752 F.3d at 1009–10.
14. See Iowa League of Cities v. EPA, 711 F.3d 844, 43 ELR 20069 (8th Cir. 2013).
16. Id.
17. One article discusses a specific instance of EPA nonacquiescence in the mid 2000s, but does not analyze the Agency’s overall authority to nonacquiesce. See Kevin Haskins, A “Delicate Balance”: How Agency Nonacquiescence and the EPA’s Water Transfer Rule Dilute the Clean Water Act After Catskill Mountains Chapter of Trout Unlimited, Inc. v. City of New York, 60 Me. L. Rev. 173 (2008).
18. In EPA’s final rule amending its regulations under the CAA, the most recent nonacquiescence scholarship cited by the Agency was a law review article published in 1991. See Amendments to Regional Consistency Regulations, 81 Fed. Reg. 51104 (Aug. 3, 2016) (to be codified at 40 C.F.R. pt. 56) (citing Dan T. Coenen, The Constitutional Case Against Intracircuit Nonacquiescence, 75 Minn. L. Rev. 1339 (1991)). Likewise, in the CWA nonacquiescence case before the D.C. Circuit, the only nonacquiescence scholarship cited in the Agency’s brief was a law review article published in 1989. See Brief for Respondent at 37–38, Cir. for Regulatory Reasonableness, 849 F.3d 453 (D.C. Cir. 2017) (No.14-1150) (citing Estricher & Revesz, supra note 2).
in part, by a controversial nonacquiescence policy adopted by the Social Security Administration (SSA) in the early 80s.\textsuperscript{20} However, over the past two decades, the topic has only occasionally resurfaced in legal literature.\textsuperscript{21} The current leading treatise on nonacquiescence—\textit{Nonacquiescence by Federal Administrative Agencies}—was published in 1989.\textsuperscript{22} In short, nonacquiescence scholarship is in dire need of an update, and an analysis of EPA's nonacquiescence authority and its implications for environmental law is both ripe and necessary.

This Article argues that EPA should establish intercircuit nonacquiescence policies under each of its statutes in the interest of preserving the structure of the federal court system and ensuring the continued development of federal environmental law. The discussion below begins with an overview of the three types of nonacquiescence as identified by scholars—intercircuit, intracircuit, and venue-choice—and details the benefits and costs of each approach. Building off of this background, the discussion turns to EPA's ability to engage in nonacquiescence under the statutes it enforces, and takes an in-depth look at EPA's recent nonacquiescence actions under the CAA and CWA. Finally, this Article argues that EPA should adopt intercircuit nonacquiescence policies tailored to individual environmental statutes, and proposes several key features that these policies should have in common to ensure both regulatory certainty and fairness.

\section{Overview of Agency Nonacquiescence}

Commentators divide agency nonacquiescence into three varieties: intercircuit nonacquiescence, intracircuit nonacquiescence, and nonacquiescence in the context of venue choice ("venue-choice nonacquiescence").\textsuperscript{23} Before diving too deeply into EPA's recent record of nonacquiescence, it is important to define these three approaches and to delineate their associated benefits and costs.

\subsection{Inter circuit Nonacquiescence}

Intercircuit nonacquiescence occurs when "an agency refuses to apply the precedent of one circuit to claims that will be reviewed by another circuit."\textsuperscript{24} Put another way, when a circuit court issues a decision overturning an agency's legal position, the agency would adhere to the adverse decision within that circuit's jurisdiction but continue to act in accordance with its own legal position in other jurisdictions. Among the forms of agency nonacquiescence, intercircuit nonacquiescence is the least controversial and the most widely accepted form of nonacquiescence.\textsuperscript{25} Additionally, in a general survey of major federal agencies, researchers found that "most agencies reported that in appropriate cases they would engage in intercircuit nonacquiescence . . . ."\textsuperscript{26}

The justifications for agency intercircuit nonacquiescence may be divided into two related categories: preserving the structure of the federal judiciary and assisting courts in developing important questions of law through intercircuit dialogue.\textsuperscript{27} First, the practice preserves the structure of the federal judiciary by ensuring that each circuit is able to develop its own "law of the circuit"\textsuperscript{28} under which circuit panels are "bound by the holding of a previously published decision in that circuit."\textsuperscript{29} Circuit courts abide by a rule of intracircuit \textit{stare decisis}: a circuit panel decision is binding on all district courts and other future panels unless overruled by the circuit en banc or by the Supreme Court.\textsuperscript{30} Crucial to maintaining the "law of the circuit" is the rejection of intercircuit \textit{stare decisis}.\textsuperscript{31} The precedent of one circuit cannot be set by other circuit courts. While the opinions of sister circuits may be persuasive, they are not binding.\textsuperscript{32}

A rule against intercircuit nonacquiescence would require a form of intercircuit \textit{stare decisis} at odds with each circuit's ability to establish its own "law of the circuit." Without some allowance for intercircuit nonacquiescence, agencies would be forced to conform all of their proceedings to adverse circuit court decisions, making it very difficult for other circuit courts to review the agency's original policy.\textsuperscript{33} In effect, an

\begin{thebibliography}{9}


\bibitem{Note20} See infra Section I.B.

\bibitem{Note21} See, e.g., Nancy M. Modesitt, \textit{The Hundred-Year War: The Ongoing Battle Between Courts and Agencies Over the Right to Interpret Federal Law}, 74 Mo. L. Rev. 949 (2009) (discussing nonacquiescence at the Equal Employment Opportunity Commission); B. Ross E. Davies, \textit{Remedial Nonacquiescence}, 89 Iowa L. Rev. 65 (2003) (proposing that scholars should recognize a type of nonacquiescence termed "remedial nonacquiescence"). While other articles have touched on nonacquiescence over the past two decades, scholarship focusing entirely on nonacquiescence is sparse.

\bibitem{Note22} See Estreicher & Revesz, supra note 2; Davies, supra note 21, at 70 (calling Nonacquiescence by Federal Administrative Agencies the "still-authoritative 1989 article").

\bibitem{Note23} See Estreicher & Revesz, supra note 2, at 687; Modesitt, supra note 21, at 958–59; Figler, supra note 19, at 1666–67. But see Davies, supra note 21, at 71 (arguing that in addition to the three generally recognized types of nonacquiescence, there is a fourth variety termed "remedial nonacquiescence").

\bibitem{Note24} Figler, supra note 19, at 1667.

\bibitem{Note25} See Independent Petroleum Ass'n of America v. Babbitt, 92 F.3d 1248, 1261 (D.C. Cir. 1996) (Rogers, J. dissenting) ("While some courts, including this one, have criticized agencies that refuse to apply the settled law of the circuit that will review the agency's action in a particular case, intercircuit nonacquiescence is permissible, especially when the law is unsettled."); Davies, supra note 21, at 71 ("Practically no objects to the first category of nonacquiescence—the intercircuit variety").

\bibitem{Note26} Estreicher & Revesz, supra note 2, at 716.

\bibitem{Note27} Figler, supra note 19, at 1669–70.

\bibitem{Note28} Id. at 1670.


\bibitem{Note30} See id. at 796–98; Rebecca Hammer White, \textit{Time for a New Approach: Why the Judiciary Should Disregard the "Law of the Circuit" When Confronting Nonacquiescence by the National Labor Relations Board}, 96 N.C. L. Rev. 639, 672–73 (1991). The justifications for \textit{stare decisis} include promoting the predictability and consistency of decisions, ensuring fairness, and maintaining confidence and trust in the judicial system. See Hohn v. United States, 524 U.S. 236, 251 (1998); Mead, supra note 29, at 792–93.

\bibitem{Note31} See Estreicher & Revesz, supra note 2, at 735–36, 736, n.275; Figler, supra note 19, at 1670. Cf. Mead, supra note 29, at 790.

\bibitem{Note32} See Davies, supra note 21, at 90.

\bibitem{Note33} See Estreicher & Revesz, supra note 2, at 737.
\end{thebibliography}
adverse circuit's interpretation of the law would become the national interpretation of the law, regardless of whether other circuits would have upheld the agency's position. In *Nonacquiescence by Federal Administrative Agencies*, Profs. Samuel Estreicher and Richard L. Revesz provide a helpful illustration of the problem:

Consider, for example, the question whether EPA can use independent contractors in enforcement proceedings under the Clean Air Act—the question at stake in *United States v. Stauffer Chemical Co.* If the first court of appeals to face this question determined that EPA could not use independent contractors, a bar against intercircuit nonacquiescence would prevent the agency from using such contractors anywhere in the country. In addition, it is unlikely that any private party would have standing to argue that the agency should be given the option of using such contractors. Thus, no subsequent court would have the opportunity to decide whether independent contractors are part of the permissible arsenal of enforcement options. . . . [T]he adverse ruling of the court of appeals would therefore become binding. . . .

As Estreicher and Revesz suggest, an outright ban on intercircuit nonacquiescence would effectively halt the development of important legal questions at the first adverse circuit court ruling. While there is no guarantee that the adverse circuit ruled correctly on the matter, the agency would have to adopt the adverse ruling even in circuits that had previously upheld its position, and “[t]he result would be a one-way ratchet in which the authoritative voice would be that of the first court of appeals to rule against the agency.”

The second justification for intercircuit nonacquiescence—intercircuit dialogue—is a natural consequence of preserving the “law of the circuit” by rejecting intercircuit stare decisis. By allowing multiple circuits to weigh in on the same agency interpretation, the “law of the circuit” creates a dialogue between different circuits that benefits the development of federal law in two primary ways. First, conflicting opinions among the circuits help the Supreme Court make better case selections by signaling that the circuits have encountered a difficult or contentious legal issue and increase the chances of a definitive ruling. Second, intercircuit dialogue likely enables both the Supreme Court and circuit courts to reach better, more thoroughly reasoned decisions. Each new court to address an issue will likely “produce a more careful and focused consideration” of the matter than the court before it because the new court has the benefit of examining the legal reasoning of the circuits that have previously addressed the question.

Additionally, each new court will be “able to observe and compare the consequences of different legal rules” in different circuits and can base its decision on the observed impacts.

However, intercircuit nonacquiescence is not without its drawbacks. A significant criticism of the practice is that it undermines a uniform application of the law by federal agencies. When an agency practices intercircuit nonacquiescence, parties within the jurisdiction of an adverse circuit will be subjected to one interpretation of the law, while parties outside of that jurisdiction will be subjected to another. This drawback is shown in the prior example provided by Professors Estreicher and Revesz regarding EPA’s use of independent contractors. In circuits that had ruled against EPA, the Agency would not be able to use private contractors in CAA enforcement proceedings; on the other hand, in circuits that had not considered the question, the practice of using private contractors would continue. The resulting asymmetry might only be temporary as a decision by the Supreme Court or an act of the U.S. Congress would bind all circuits to one interpretation of the law.

**B. Intracircuit Nonacquiescence**

Unlike intercircuit nonacquiescence, intracircuit nonacquiescence has faced harsh criticism from both courts and commentators. Intracircuit nonacquiescence describes an
agency’s refusal to “follow the precedents of the circuit in which it knows an agency decision will be appealed.” In other words, an agency practices intracircuit nonacquiescence when it receives an adverse circuit court decision, but refuses to conform its proceedings in future actions to the adverse decision despite knowing that the adverse circuit will review those actions.

Judicial and scholarly skepticism towards intracircuit nonacquiescence is rooted largely in constitutional considerations. While legal scholars have produced a variety of constitutional arguments against intracircuit nonacquiescence, most commentators agree that, at the very least, intracircuit nonacquiescence poses a separation of powers problem. Intracircuit nonacquiescence may infringe on the judiciary’s power to interpret the law by enabling agencies to disregard circuit precedent in their administrative proceedings. As one court put it, “[t]he judiciary’s duty and authority, as first established in Marbury, ‘to say what the law is’ would be rendered a virtual nullity if coordinate branches of government could effectively and unilaterally strip its pronouncements of any precedential force.”

One counterargument to the uneasy constitutionality of intracircuit nonacquiescence is the practice encourages intercircuit dialogue and aids in the development of legal questions. Returning to the example of EPA’s use of independent contractors, Estreicher and Revesz posit a scenario in which the U.S. Court of Appeals for the Second Circuit strikes down the use of such contractors, but afterwards both the Sixth Circuit and the U.S. Court of Appeals for the Ninth Circuit uphold the practice:

It would be desirable for the agency to be able to go back before the Second Circuit and reargue its position in light of subsequent victories. The Second Circuit might be persuaded by the arguments of the two other circuits, and the conflicting positions might be harmonized without the need for review by the Supreme Court.

However, the benefits of this intercircuit dialogue are conditioned upon the circuit’s willingness to overturn past precedent and the agency’s success rate at convincing courts to do so. As some commentators have suggested, circuit reconsideration of past precedent is so rare that only marginal intercircuit dialogue is produced by intracircuit nonacquiescence.

Another argument in favor of intracircuit nonacquiescence is that it promotes uniform application of the law by federal agencies across all circuits. Instead of the agency applying two interpretations of the law—which could lead to unfair outcomes, especially among competitive industries—the agency need only apply its interpretation of the law. However, as critics are quick to point out, the resulting “horizontal” uniformity across the circuits comes at the expense of “vertical” uniformity. While the agency may be applying the law uniformly in its proceedings, the district courts are obligated to apply the law of the circuit. Parties who lose on the administrative level need only appeal their case to the federal courts to receive a favorable ruling. The lack of vertical uniformity effectively creates two legal regimes: one for well-heeled, sophisticated claimants who are able to seek judicial review, and one for “[t]hose not so blessed . . . whose claims will remain rejected on the basis of unfavorable agency rules.” In addition to the fundamental unfairness of this scheme, these disparate results may also violate the Fifth Amendment’s Equal Protection Clause.

A final argument in favor of intracircuit nonacquiescence is that the resulting horizontal uniformity may enable agencies to save on the administrative costs of training agency personnel to follow the agency’s policy and adverse circuit decisions. However, this benefit has also been disputed. As commentators have pointed out, simply adhering to the law of circuit could cut agency costs:

In many cases, nonacquiescence causes two rounds of administrative proceedings where only one would have been necessary if circuit rules had been applied by the agency in the first instance . . . . [T]here can be little question that the administrative costs of readjudicating every case where the circuit abides by its prior decisions would exceed those of compliance with case law.

Moreover, the practice likely creates costs within the federal court system by increasing the volume of cases reaching the courts. When a circuit court overturns an agency policy, litigants will naturally seek review. If the agency acquiesces to the circuit’s decision, the review would stop at the agency level, because the litigant would be satisfied with the
agency’s determination.63 However, when the agency nonacquiesces to the circuit decision, litigants have to appeal their case to a federal court to take advantage of the change in circuit precedent.64

C. Venue-Choice Nonacquiescence

The final category of nonacquiescence describes an agency’s refusal to follow the case law of a circuit, “but review may be had either in that court or in one that has not rejected the agency’s position.”65 Put differently, an agency engages in venue-choice nonacquiescence when it refuses to follow the precedent of an adverse circuit, but cannot be certain that the adverse circuit will actually review its proceedings, or whether review will be had in a favorable circuit or a circuit that has not considered the issue. As one colorful commentator described it: “Venue choice nonacquiescence is the Schrödinger’s Cat of administrative law.”66

A good example of an agency with a long-standing venue-choice nonacquiescence policy is the National Labor Relations Board (NLRB). The National Labor Relations Act (NLRA)67 authorizes the NLRB to enforce the unfair labor practice provisions of the Act.68 Any person “aggrieved” by the NLRB’s final order in an NLRA case may seek review of the order in the circuit court where the unfair labor practice occurred, in the circuit court where the person resides or transacts business, or in the D.C. Circuit.69 Therefore, where there are multiple “aggrieved” persons to the Board’s order, judicial review of the order could be had in multiple circuits.70 Therefore, the Board does not know whether its order will be reviewed in an adverse circuit or a non-adverse circuit, and the Board must conduct its proceedings largely in ignorance of the reviewing court.

Venue-choice nonacquiescence as practiced by the NLRB has been met with mixed reactions by courts.71 However, many scholars have taken a kinder view of the practice, equating venue-choice nonacquiescence more to intercircuit rather than intracircuit nonacquiescence.72 Unlike intracircuit nonacquiescence, venue-choice nonacquiescence is not a bald-faced challenge to the judiciary’s Article III authority. While the agency’s position may resemble intracircuit nonacquiescence to the reviewing court, in truth the agency conducted its proceedings without knowing whether its actions would be reviewed in an adverse or non-adverse circuit.73

Moreover, venue-choice nonacquiescence achieves many of the same benefits as intercircuit nonacquiescence by preserving the role of each regional circuit in developing the law of the circuit.74 A rule against venue-choice nonacquiescence would force any agency operating under a broad venue provision to conform all of its administrative actions to the ruling of an adverse circuit, thereby preventing non-adverse circuits from reviewing the agency’s original position.75 Consequently, the Supreme Court would have greater difficulty choosing cases involving the agency for review. Likewise, neither the Supreme Court nor other circuits would be able to reap the benefits of intercircuit dialogue in developing questions of law concerning the agency.76

II. Nonacquiescence and EPA

As the NLRB example from above demonstrates, an agency’s internal structure and enabling statute largely determine how the agency may engage in nonacquiescence. EPA is no exception to this rule: the types of nonacquiescence available to EPA are a product of the various environmental statutes administered by the Agency and the Agency’s regional enforcement structure.77 Until recently, the scope of EPA’s nonacquiescence authority went largely untested because the Agency has traditionally avoided nonacquiescence under any circumstance.78 However, both the Agency’s rulemak-

63. Id.
64. Id.
65. Id. at 687.
66. Davies, supra note 21, at 81.
68. § 156; Estreicher & Revesz, supra note 2, at 705.
69. § 160(f).
70. Once the Board issues its order, determining a final venue for judicial review is a matter of luck and timing. Under 28 U.S.C. § 2112(a) (2012), the Board must file the record in the court where review is sought. If two or more parties file in different circuits within 10 days of the Board’s order, the NLRB must apply to the Judicial Panel on Multidistrict Litigation to decide where it should file the record. §§ 2112(a)(1). However, if only one petition for review is filed within the 10-day window, the Board will file the record with that court. § 2112(a)(1). Finally, if none of the parties file within 10 days, the Board will file the record with the first court to receive a petition for review, effectively setting up a first-to-file rule. Id. See also United Auto., Aerospace, and Agric. Implement Workers v. NLRB, 677 F.3d 276, 277 (6th Cir. 2012).
71. See Heartland Plymouth Court MI, LLC v. NLRB, 888 F.3d 16, 22–25 (D.C. Cir. 2016) (noting that while the circuit had previously approved of venue-choice nonacquiescence, in this particular case the Board improperly engaged in intracircuit nonacquiescence because it knew that the case would be appealed to the D.C. Circuit yet persisted in applying an interpretation of the law contrary to circuit precedent); Johnson v. U.S. R.R. Ret. Bd., 969 F.2d 1082, 1092 (D.C. Cir. 1992) (distinguishing the NLRB’s permissible venue-choice nonacquiescence from the Railroad Retirement Board’s impermissible intracircuit nonacquiescence); NLRB v. Ashkenazy Prop. Mgmt. Corp., 817 F.2d 74, 75 (9th Cir. 1987) (holding that the Board should adhere to circuit precedent “unless the Board has a good faith intention of seeking review of the particular proceeding by the Supreme Court.”); Allegheny Gen. Hosp. v. NLRB, 608 F.2d 965, 970 (3d Cir. 1979) (“But the Board is not a court nor is it equal to this court in matters of statutory interpretation. . . . For the Board to predicate an order on its disagreement with this court’s interpretation of a statute is for it to operate outside the law.”).
72. See, e.g., Estreicher & Revesz, supra note 2, at 741 (“For the most part, [venue-choice nonacquiescence] . . . raises the same issues as intercircuit nonacquiescence”); Diller & Morawetz, supra note 19, at 802 n.8 (acknowledging that venue-choice nonacquiescence “raises different questions from intracircuit nonacquiescence”); Schwartz, supra note 19, at 1833–34 n.59 (“The distinction recognized by Professors Estreicher and Revesz between intracircuit nonacquiescence and nonacquiescence in the presence of venue choice is useful because different factors bear on the lawfulness of nonacquiescence in these two situations.”). Notably, the D.C. Circuit also took a more favorable view of venue-choice nonacquiescence after the publication of Estreicher & Revesz’ seminal article. Compare Johnson, 969 F.2d at 1092, with Yellow Taxi Co. of Minn. v. NLRB, 721 F.3d 366, 382–83 (D.C. Cir. 1983).
73. See Estreicher & Revesz, supra note 2, at 742 (noting that reviewing courts sometimes treat venue-choice nonacquiescence as intracircuit nonacquiescence because, “from the perspective of that court, the agency’s behavior looks like intracircuit nonacquiescence” and courts often rush to criticize the practice “without considering the differences between [the two].”).
74. See Estreicher & Revesz, supra note 2, at 741.
75. See id.
76. See infra Section I.A. (discussing benefits of intercircuit nonacquiescence).
77. See supra Section II.A.
78. See Estreicher & Revesz, supra note 2, at 716.
ing under the CAA and litigation before the D.C. Circuit under the CWA demonstrate that the Agency is presently engaged in intercircuit nonacquiescence and will continue to do so in the future. These cases help explain how the Agency approaches nonacquiescence and delineate counter-arguments to the practice.

A. General Principles of EPA Nonacquiescence

Nonacquiescence at EPA is guided both by the Agency’s internal structure and by the judicial review provisions of statutes administered by the Agency. EPA is headed by a single Administrator, who is appointed by the president with the advice and consent of the U.S. Senate. Working through a variety of specialized offices at EPA headquarters in Washington, the Administrator develops the Agency’s nationally applicable programs and regulations. Implementation and enforcement of these national programs and regulations falls to ten regional offices, each of which oversees a designated geographical area. Most environmental statutes also allow EPA to delegate some of its enforcement and implementation authority to state governments.

If enforcement responsibility falls on EPA, the Agency may either proceed by filing a civil or criminal enforcement action in federal court, or by initiating administrative enforcement proceedings. In an administrative proceeding, the case is first heard before an administrative law judge (ALJ) or regional judicial officer (RJO). The decisions of the ALJ or RJO may be appealed to the Environmental Appeals Board (EAB). The EAB’s decision represents the final Agency action, and may be appealed in federal court.

Like the NLRB, EPA’s approach to nonacquiescence is largely dictated by the judicial review provisions of the particular statute at issue. However, no single statute authorizes EPA to enforce federal environmental law. Rather the Agency was created by executive order and has since been tasked with enforcing a variety of environmental statutes.

Today, EPA has sole or partial responsibility for administering over twenty statutes, including the CAA, the CWA, the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), the Safe Drinking Water Act (SDWA), the Resource Conservation and Recovery Act (RCRA), and the Toxic Substances Control Act (TSCA). Each of these statutes contains a separate judicial review provision dictating which courts may hear which cases. Consequently, EPA may be able to practice different types of nonacquiescence depending on the statute at issue and the circumstances of the particular case.

This distinction is best understood by comparing two different statutes: RCRA and CERCLA. Under RCRA, EPA may issue permits for hazardous waste storage facilities. Judicial review of a particular permit may be sought by “any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts such business . . . .” Interests “persons” could include states, national environmental groups, individual citizens, trade associations, or even other federal agencies. In effect, many circuits could potentially review a permitting decision, including circuits with adverse precedent. If EPA nonacquiesces to adverse precedent when issuing a permit, the Agency would be engaging in venue-choice nonacquiescence because the Agency has no means of knowing which court will review the decision.

By contrast, suppose EPA wishes to remediate a hazardous waste dumping site in Illinois and recover the costs of its cleanup from the party responsible for dumping the waste. Under CERCLA’s judicial review provision, venue for the cost recovery action “shall lie in any district in which the hazardous substance release or damages occurred, or in which the defendant resides, may be found, or has his principal office.” If the defendant does all of its business in Illinois and also claims residence in Illinois, then EPA knows for certain that the U.S. Court of Appeals for the Seventh Circuit precedent will apply to the cost recovery claim. In this instance, the Agency would only be able to engage in intercircuit nonacquiescence by ignoring adverse precedent in another circuit, or intracircuit nonacquiescence by ignoring Seventh Circuit precedent.

Notably, however, many environmental statutes preclude any form of nonacquiescence by vesting sole review of certain nationally applicable agency actions in the D.C. Circuit.

References

79. See infra Section II.B.
83. See Esworthy, supra note 82, at 10. For instance, Section 402 of the CWA allows each state to administer its own permitting program for pollutant discharges, provided that the Administrator approves of the plan. 33 U.S.C. § 1342(b) (2012).
84. See Esworthy, supra note 82, at 22–24.
85. See id. at 22–23.
86. See Esworthy, supra note 82, at 23.

96. 42 U.S.C. § 6976(b).
100. See, e.g., 42 U.S.C. §§ 300j–7(a), 6976(a)(1), 6976(b), 7007(b)(1), 9613(a)–(b). A notable exception to this general rule is the CWA, which provides that interested persons may challenge nationally applicable regulations in the circuit court in which the person resides or transacts business affected by the regu-
Under the CAA, for instance, the D.C. Circuit has sole jurisdiction over EPA actions that set national ambient air quality standards, standards for new stationary sources of air pollution, and motor vehicle emission standards. Likewise, under the SDWA, only the D.C. Circuit can review national primary water regulations.

Under these provisions, EPA effectively cannot practice any form of nonacquiescence. Venue-choice and intercircuit nonacquiescence require, by definition, the opportunity for review by multiple circuits; where only one circuit can review an agency action, both venue-choice and intercircuit nonacquiescence are inapplicable. Likewise, while EPA may theoretically engage in intracircuit nonacquiescence by refusing to conform its proceedings to an adverse D.C. Circuit decision, the practice would be unprecedented. Moreover, the benefits of practicing intracircuit nonacquiescence in this context are almost nonexistent. No intercircuit dialogue is advanced because no other circuit can consider the decision, and the D.C. Circuit is unlikely to reconsider its decision without sister circuit opinions to the contrary.

B. Recent EPA Nonacquiescence Actions

Unlike the SSA and NLRB, EPA does not have a storied history of asserting its right to nonacquiesce in federal court. In preparing to write Nonacquiescence by Administrative Agencies, Professors Estreicher & Revesz conducted a survey of major federal agencies regarding their nonacquiescence practices. EPA was one of only two agencies to indicate that it did not engage in any form of nonacquiescence. As Estreicher and Revesz explained:

In our discussion with EPA General Counsel we learned that with respect to both rulemaking and enforcement actions, EPA’s general policy is to eschew relitigation of an issue that has been squarely decided against it in any circuit. Enforcement actions are brought in the district courts, however, and EPA will on occasion seek to preserve its position by not appealing to an adverse district court decision. [The General Counsel] explained that, because of a special need to maintain uniformity in the environmental context, and a relatively responsive Congress, the agency has avoided relitigation as a tool of policy.

While the Agency may have attempted avoiding nonacquiescence in the past, recent actions indicate that the Agency has since adopted a different posture. In National Environmental Development Ass’n’s Clean Air Project v. EPA (NEDACAP I), the Agency argued before the D.C. Circuit that it could nonacquiesce to a Sixth Circuit decision regarding the definition of “major sources” under Title V of the CAA. When the D.C. Circuit ruled against EPA, holding that the Agency’s Regional Consistency Regulations precluded nonacquiescence, the Agency responded by amending the regulations specifically to accommodate intercircuit nonacquiescence. The Agency later successfully defended the amended regulations in a second case before the D.C. Circuit, National Environmental Development Ass’n’s Clean Air Project v. EPA (NEDACAP II). Similarly, in Center for Regulatory Reasonableness v. EPA, EPA argued that it could nonacquiesce to a decision of the Eighth Circuit regarding the definition of “secondary treatment” under the CWA. Although the court in Center for Regulatory Reasonableness v. EPA ultimately did not resolve the nonacquiescence issue in the case, arguments raised by the petitioners against the practice suggest that the Agency’s nonacquiescence authority may be significantly limited by the statute.

I. NEDACAP and Amendments to CAA Regional Consistency Regulations

The legal saga leading up to EPA’s decision to amend its Regional Consistency Regulations began with the Sixth Circuit’s decision in Summit Petroleum Corp. v. EPA. In Summit, the court struck down EPA regulations under Title

109. Id.
110. 752 F.3d 999, 44 ELR 20123 (D.C. Cir. 2014).
111. See id. at 1003.
112. See Regional Consistency Regulations, 40 C.F.R. § 56.3(a) (2014).
115. 849 F.3d 453, 47 ELR 20031 (D.C. Cir. 2017).
117. See 849 F.3d at 454.
118. See Brief for Respondent at 37–38, Ctr. for Regulatory Reasonableness, 849 F.3d 453 (D.C. Cir. 2017) (No.14-1150); Center for Regulatory Reasonableness, 849 F.3d at 454.
119. 690 F.3d 733, 42 ELR 20167 (6th Cir. 2012).
V of the CAA, which declared that multiple pollutant emitting activities could be regulated as a single “major source” of pollution so long as the activities were “located on one or more contiguous or adjacent properties.” Two months after the Summit decision, the Director of EPA’s Office of Air Quality and Standards issued a memorandum (the “Summit Directive”) addressing the impact of the Sixth Circuit’s determination. The Summit Directive stated that in areas under Sixth Circuit jurisdiction, EPA “may no longer consider interrelatedness in determining adjacency when making source determination decisions in its Title V or New Source Review (NSR) permitting decisions . . . .” In an unequivocal statement of intercircuit nonacquiescence, however, the Agency determined that it would not “change its longstanding practice of considering interrelatedness in EPA permitting actions in other jurisdictions.”

In 2013, the National Environmental Development Association (“the Association”) challenged the Summit Directive in the D.C. Circuit on two grounds. First, the Association argued that Section 7601 of the CAA precludes any intercircuit nonacquiescence under the statute. Section 7601 requires EPA to issue regulations that “assure fairness and uniformity in the criteria, procedures, and policies applied by the various regions in implementing and enforcing [the CAA].” Second, the Association argued that even if the language of Section 7601 did not preclude intercircuit nonacquiescence, the regulations (“Regional Consistency Regulations”) passed pursuant to Section 7601 nonetheless forbid the Agency from engaging in nonacquiescence because they required regional administrators to ensure that their actions “[a]re as consistent as reasonably possible with the activities of other Regional Offices . . . .”

A D.C. Circuit panel vacated the Summit Directive on this latter argument. The court held that because EPA’s regulations mandated uniformity in enforcing the CAA, the Agency could not simply ignore unfavorable circuit court decisions and must apply the Summit holding both within and outside of the Sixth Circuit. Notably, the court did not address the Association’s first argument that the CAA itself precluded nonacquiescence. Furthermore, the court suggested that EPA might be able to comply with its own regulations simply by “revis[ing] its uniformity regulation to account for regional variances created by a judicial decision or circuit splits.”

In August 2016, the Agency took the court’s advice and issued a final rule amending the Regional Consistency Regulations to accommodate intercircuit nonacquiescence. The new regulations have two primary components. First, the regulations establish a presumption that in the event of an adverse circuit decision, the regional offices will continue to apply the Agency’s national policy in jurisdictions outside the adverse circuit. Second, the new regulations provide that the regional offices should apply an adverse circuit decision within that circuit’s jurisdiction, and may do so without seeking a concurrence from EPA headquarters. In support of the new policy, EPA turned to the traditional rationales in favor of intercircuit nonacquiescence, including preserving the federal court structure and encouraging the development of federal law. The Agency also stressed that intercircuit nonacquiescence promotes predictability for regulated industries. Instead of guessing how the Agency will respond, EPA argued that regulated entities could presume that “[it] will continue to apply the national policy nationwide, except for those geographic areas impacted by the adverse decision.”

The Agency rejected several commenters’ suggestion that the Agency “add regulatory text defining the parameters under which the Agency would be required to re-evaluate its national policy following adverse court decisions.” After consideration, the Agency determined that a case-by-case approach “is best because it allows EPA to consider the individual merits of each decision . . . rather than apply a rigid formula.” Likewise, the Agency rejected suggestions that it add text requiring the Agency’s headquarters to concur in a regional office’s decision to deviate from national policy. According to the Agency, requiring a concurrence may undercut one key purpose of the regulations “to establish the presumption that national policy remains national policy . . . .”

In response to the amended Regional Consistency Regulations, the Association launched a second challenge in the D.C. Circuit (NEDACAP II), arguing again that Section 7601 of the CAA precludes intercircuit nonacquiescence under the statute. A circuit panel denied the petition for review of the regulations, characterizing the Association’s

120. 40 C.F.R. § 71.2 (2016); see Summit, 690 F.3d at 744.
122. Id. at 1.
123. Id.
126. NEDACAP II, 752 F.3d 999, 1011, 44 ELR 20123 (D.C. Cir. 2014).
127. Id. at 1011 (“[a]n agency may not refuse to acquiesce if doing so violates its own regulations. . . . EPAs current regulations preclude EPAs inter-circuit nonacquiescence [sic] in this instance . . . .”)
128. Id.
129. Id. at 1010.
131. Id. at 51109, 51113.
132. Id. at 51105, 51114.
133. Id. at 51103–04. See supra Section I.A., for a complete discussion of the arguments for and against intercircuit nonacquiescence.
135. Id. at 51108–09:
136. Id. at 51111.
137. Id.
138. Id.
139. Id.
140. NEDACAP II, No. 16.1344 at 4, 48 ELR 20093 (D.C. Cir. 2018).
position as “difficult to comprehend . . . ” The court questioned how the Association would have preferred the Agency to respond after the Summit decision:

Petitioners contend that the agency cannot follow the approach announced in the Summit Directive. Does that mean that EPA must apply the Sixth Circuit decision in all regions? The statute does not require this. And if the Seventh Circuit subsequently issues a judgment that is at odds with the Sixth Circuit decision, would EPA be required to change its position again? Petitioners offer no viable answers.

While the court did not explicitly lend support to the practice of intercircuit nonacquiescence, it found EPA’s regulations to be a reasonable response to the “potential for intercircuit inconsistency” created by the CAA. The court noted that if EPA were required to change its policy each time a circuit court issued an adverse decision, “the first court of appeals to address an issue would determine EPA’s policy nationwide.”

The court also acknowledged that intercircuit conflicts were not “inherently bad” and that intercircuit nonacquiescence could help foster intercircuit dialogue. Finally, the court recognized that the downside of the Regional Consistency Regulations, “[p]etitioners’ ostensible parade of horribles—a potentially national thicket of inconsistent decisions—is overblown, to say the least . . . ” because inconsistent decisions could be resolved by either the Supreme Court or a change in the Agency’s rules or policies.

After the legal saga leading to NEDACAP II, the Regional Consistency Regulations represent the Agency’s most litigated and most authoritative statement in support of nonacquiescence. The regulations provide a comprehensive approach to nonacquiescence under one of the Agency’s most important statutes, and as discussed in Part III, may also serve as a basic model for agency nonacquiescence under other statutes. Before assessing this prospect however, it is important to consider the Agency’s other recent major nonacquiescence action.

2. Nonacquiescence Following Iowa League of Cities

Around the same time that EPA issued the Summit Directive asserting a right to nonacquiesce under the CAA, EPA also asserted a right to nonacquiesce under another major environmental statute, the CWA. In Iowa League of Cities v. EPA, the Eighth Circuit vacated an EPA policy (the “blending rule”) which interpreted the statutory term “secondary treatment” of wastewater to include only biological treatment rather than treatment through physical and chemical processes. In November 2013, the United States Conference of Mayors, the National League of Cities, the National Association of Counties, and other entities wrote a letter to EPA seeking clarification of whether the Eighth Circuit’s decision would be implemented nationally. In two letters from April and June 2014, EPA replied that the decision in Iowa League of Cities only constituted binding precedent in the Eighth Circuit. In August 2014, the Center for Regulatory Reasonableness (“Center”) filed a petition for review with the D.C. Circuit, stating that through the April and June letters, EPA had impermissibly reissued the vacated blending rule outside the Eighth Circuit.

The Center made three primary arguments in favor of national application of the Eighth Circuit’s decision in Iowa League of Cities. First, the Center argued that intercircuit nonacquiescence, as practiced by EPA through the April and June letters, contravenes the CWA’s implicit objective of establishing nationally applicable standards. Second, the Center argued that allowing for intercircuit nonacquiescence would create “regulatory havoc” by leading to different requirements for regulated industry in different circuits, and burdening individual EPA regional offices with the enforcement of multiple circuit standards.

Finally, the Center argued that the judicial review provision of the CWA precludes EPA nonacquiescence. The relevant judicial review provision of the CWA provides that:

Review of the Administrator’s action . . . in approving or promulgating any effluent limitation or other limitation under section 1311, 1312, 1316, or 1345 of this title . . . may be had by any interested person in the Circuit Court of Appeals of the United States for the Federal judicial district in which such person resides or transacts business which is directly affected by such action upon application by such person.

When multiple parties file challenges under this section in more than one circuit, those actions are subject to 28 U.S.C. § 2112(a) (2012), which consolidates the petitions into one circuit by lottery and then allows only that circuit to adjudicate the petitions. Both the Center and EPA agreed that

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141. Id. at 4–5.
142. Id. at 4.
143. Id. at 5, 14.
144. Id. at 18.
145. Id. at 14.
146. Id. at 18.
147. See supra Part III.
148. 711 F.3d 844, 43 E.L.R. 20069 (8th Cir. 2013).
149. See id. at 876–78.
152. Petition for Review at 2, Ctr. for Regulatory Reasonableness v. EPA, 849 F.3d 453 (D.C. Cir. 2017) (No. 17-334). In its reply brief, EPA vigorously disputes that the April and June letters constituted any such decision, but instead simply shared “certain incomplete and interlocutory views regarding Iowa League’s impact or non-impact on [existing regulations].” Brief for Respondent at 17–18, Ctr. for Regulatory Reasonableness, 849 F.3d 453 (D.C. Cir. 2017) (No. 14-1150).
154. Id. at 52–53.
155. Id. at 46–50.
the lottery-winning circuit's decision has binding effect on all other circuits. However, the Center argued that although there was only one petition for review in Iowa League of Cities—rendering the consolidation provision of 28 U.S.C. § 2112(a) inapplicable—the Eighth Circuit's decision should still have binding national effect.

Unfortunately, the court's decision in the case neither addressed nor resolved the nonacquiescence question. In a succinct four-page opinion, the circuit panel dismissed the petition for review for lack of jurisdiction. The April and June letters did not constitute a "promulgation" of an effluent limitation needed to grant the court jurisdiction under 33 U.S.C. § 1369(b)(e). Rather, they "merely articulat[ed] how EPA will interpret the Eighth Circuit's decision." In effect, the question of whether the CWA precludes nonacquiescence is still unsettled and open to challenge.

III. Proposed EPA Intercircuit Nonacquiescence Policies

Given EPA's recent willingness to engage in nonacquiescence, the Agency should adopt clear intercircuit nonacquiescence policies under all of its statutes to avoid future litigation and confusion over its nonacquiescence authority. Such policies should be modeled on both EPA's Regional Consistency Regulations and the Social Security Administration's time-tested nonacquiescence policy to minimize regulatory uncertainty, ensure uniform application of the law, and promote fairness for regulated industries.

A. Best Among Rivals: Intercircuit Nonacquiescence

When seeking to accommodate nonacquiescence into its regulatory schemes, EPA should adopt policies favoring intercircuit nonacquiescence. The benefits of intercircuit nonacquiescence are well-established. As discussed in Part I, intercircuit nonacquiescence permits each circuit to establish its own "law of the circuit" and thereby encourages intercircuit dialogue regarding difficult questions of law. Circuit splits produced by intercircuit dialogue help the Supreme Court make better case selections. Additionally, intercircuit dialogue produces better court opinions by allowing reviewing courts to draw upon the arguments made by past circuits. Finally, if EPA were to always acquiesce with the first adverse decision on a particular question, other circuits would have few opportunities to review the Agency's original policy, effectively stalling the development of environmental law.

As EPA acknowledged in the Regional Consistency Regulations, intercircuit nonacquiescence comes with a significant drawback: inconsistency in the application of federal environmental law across different circuit jurisdictions. When EPA applies different legal interpretations to different regions, some industry players gain a competitive advantage over others based simply on location. However, the problem of regulatory inconsistency is not unique to intercircuit nonacquiescence, but rather a consequence of the federal court structure dividing the country into eleven regional circuit jurisdictions. Under any alternative—intracircuit nonacquiescence or nationwide acquiescence—EPA sacrifices uniform application of the law in some respect. For instance, if EPA were to practice widespread intracircuit nonacquiescence, the Agency would achieve horizontal uniformity (consistent application of the law across courts) at the expense of vertical uniformity (consistent application of the law across agency proceedings and the federal judiciary).

Parties need only find their way to federal court to take advantage of an Appeal for the Tenth Circuit but subject to 28 U.S.C. § 2112(a) may not be adjudicated there if a different circuit won the lottery; supra note 67 (discussing the lottery process in the context of NLRA orders).

158. See Brief for Respondent at 40, Ctr. for Regulatory Reasonableness, 849 F.3d 453 (D.C. Cir. 2017) (No. 14-1150); Brief for Petitioner at 1, Ctr. for Regulatory Reasonableness, 849 F.3d 453 (D.C. Cir. 2017) (No. 14-1150).


161. Id.

162. Id.


164. Since commenters have generally equated venue-choice nonacquiescence with intercircuit nonacquiescence, see infra note 69--73 and accompanying text, this section generally applies to both types of nonacquiescence. However, for the sake of brevity, this section only uses the term "intercircuit nonacquiescence." For a full discussion of how agency policies may incorporate venue-choice nonacquiescence, see infra Section III.B.2.

165. See supra Section I.A.

166. See infra Section I.A.

167. See supra Section I.A. For examples of intercircuit dialogue influencing Supreme Court opinions and circuit splits leading to grants of certiorari within the environmental law context, see generally CTS Corp. v. Waldburger, 134 S. Ct. 2175, 44 ELR 20125 (2014) (granting certiorari to resolve whether CERCLA preempts state statutes of repose for tort suits related to hazardous waste disposal); United States v. Bestfoods, 524 U.S. 51, 28 ELR 21225 (1998) (granting certiorari to resolve a circuit split "over the extent to which parent corporations may be held liable under CERCLA"); Mephrig v. KFC Western, Inc., 516 U.S. 479, 26 ELR 20820 (1996) (granting certiorari to resolve a circuit split regarding remedies under RCRA). See also supra note 41.


169. See Richard Alonso & Brittany M. Pemberton, EPA's Regional Consistency Regs Tilt the Playing Field, Law 360 (Oct. 28, 2016), https://www law360.com/appellant/articles/855702/epa-s-regional-consistency-regs-tile-the-playing-field; Estreicher & Revesz, supra note 2, at 717 (summarizing a discussion with EPA General Counsel Francis Blake, in which Mr. Blake acknowledged that a "special need to maintain uniformity in the environmental context" discouraged nonacquiescence at the Agency); cf. Estreicher & Revesz, supra note 2, at 748 ("[A] central goal of federal regulation is to prevent regions from competing for industry by offering a more favorable economic climate at the expense of other societal goals. . . . As long as the conflict among the circuits persists, there will be undesirable regional competition."). Courts have also recognized that one of the primary purposes behind federal environmental laws was to establish nationally uniform standards. See, e.g., E.I. Du Pont de Nemours & Co. v. EPA, 430 U.S. 112, 129, 7 ELR 20191 (1977) (recognizing the establishment of uniform standards as a primary congressional purpose behind amendments to the Federal Water Pollution Control Act).


171. See Amendments to Regional Consistency Regulations, 81 Fed. Reg. at 51108. ("Some difference in governing rules is inherent in our federal judiciary system where district and circuit courts are limited to a definitive jurisdiction. The federal judicial system was designed to allow numerous, and sometimes conflicting, decisions . . ."); cf. Estreicher & Revesz, supra note 2, at 741 n. 302.

172. See supra Section II.A.; supra note 57.
adverse circuit decision and a different application of environmental law.\textsuperscript{175} Likewise, nationwide acquiescence also fails to guarantee uniformity among the circuits in every situation. For instance, if two circuits issued conflicting rulings on the same legal question, EPA would be unable to apply both decisions nationwide.\textsuperscript{176} While EPA could apply the conflicting rulings within the respective jurisdictions of those circuits, the Agency could only choose one ruling to apply in neutral circuit jurisdictions. The result, therefore, would be like the result achieved through intercircuit nonacquiescence: national application of one policy except for an outlying, adverse circuit.

While intercircuit nonacquiescence is not a perfect solution for how EPA should handle adverse circuit decisions, it is the best available solution for balancing the inherent inequities of the federal court structure with the need for intercircuit dialogue on important questions of environmental law. The following section provides a blueprint of how the Agency might accommodate intercircuit nonacquiescence in a variety of statutory schemes, and proposes measures that the Agency could adopt to mitigate the harmful impacts of the practice.

B. Proposed Features of EPA Nonacquiescence Policies

EPA should establish nonacquiescence policies that promote regulatory consistency, uniformity, and fairness in Agency responses to adverse circuit decisions. In pursuit of these goals, the Agency’s nonacquiescence policies should include three key features. First, any new nonacquiescence policy should establish default Agency responses to adverse circuit decisions. Under many statutes, this could be expressed as a presumption in favor of intercircuit nonacquiescence much like that found in the Regional Consistency Regulations.\textsuperscript{177} Second, new nonacquiescence policies should require EPA headquarters to issue concurrences to acquiescence determinations made by regional offices. Finally, EPA nonacquiescence policies should provide the Agency the flexibility to deviate from intercircuit nonacquiescence under certain prescribed circumstances.

1. Presumption of Intercircuit Nonacquiescence

First and foremost, every EPA nonacquiescence policy should establish a default Agency response to adverse circuit decisions. Generally, the Agency’s responses should resemble the default response outlined in the Regional Consistency Regulations.\textsuperscript{178} Under those regulations, the Agency applies the adverse circuit’s holding within that circuit’s jurisdiction, but continues to apply the Agency’s original position in other jurisdictions.\textsuperscript{179} In other words, the Regional Consistency Regulations require the Agency to apply a presumption of intercircuit nonacquiescence.\textsuperscript{180} As explained in the final rule amending the Regional Consistency Regulations, establishing a presumption of intercircuit nonacquiescence generates greater consistency and predictability in Agency nonacquiescence actions by placing regulated industry on notice of how the Agency will apply adverse circuit decisions.\textsuperscript{181}

Admittedly, this approach does not always produce perfect results. Under statutes with broad venue provisions, the Agency may not be able to predict with absolute certainty which court will review its actions and may inadvertently face review in a circuit with adverse precedent. Consider the prior example of venue-choice nonacquiescence in the context of RCRA.\textsuperscript{182} Under RCRA, review of permits for hazardous waste storage facilities may be made by “any interested person” in any circuit where that person “resides or transacts business.”\textsuperscript{183} In practice, this means that a particular permit could be reviewed in an adverse and non-adverse circuit. While the Agency may intend to practice intercircuit nonacquiescence, to a reviewing adverse circuit, the Agency will appear to be engaging in intracircuit nonacquiescence.

Despite this drawback, adopting a presumption of intercircuit nonacquiescence is still preferable for statutes with broad venue provisions. First, venue-choice nonacquiescence constitutes a challenge for the Agency regardless of whether the Agency adopts any default nonacquiescence policy. Even without a default response in place, the Agency must still decide how to apply adverse holdings. Establishing a presumption of intercircuit nonacquiescence simply reduces uncertainty about the Agency’s response to adverse holdings; it does not create the problems associated with venue-choice nonacquiescence. Second, if EPA faces review in a circuit with adverse precedent, the Agency can avoid the appearance of intracircuit nonacquiescence simply by declining to re-litigate the issue.\textsuperscript{184} While the Agency may lose the particular case, it may be within the Agency’s best interest to avoid flouting circuit court authority.

2. Published Headquarters Concurrences

In addition to establishing a presumption of intercircuit nonacquiescence, any new agency nonacquiescence policy should require regional offices to seek concurrences from EPA headquarters before applying adverse circuit precedent to their proceedings. Ideally, the agency would issue require-

\textsuperscript{177} See id. at 51102, 51109.
\textsuperscript{178} While EPA never uses the term “presumption of inter-circuit nonacquiescence,” the policy set out in the Regional Consistency Regulations clearly requires the regional offices to engage in intercircuit nonacquiescence by cabin-
\textsuperscript{179} Amendments to Regional Consistency Regulations, 81 Fed. Reg. at 51108–09.
\textsuperscript{180} See supra text accompanying notes 92–94.
\textsuperscript{181} 42 U.S.C. §§ 6925, 6976(b) (2012).
\textsuperscript{182} See generally Estreicher & Revess, supra note 2, at 717 (noting that the Agency
\textsuperscript{173} See supra Section II. B.
\textsuperscript{174} See Amendments to Regional Consistency Regulations, 81 Fed. Reg. at 51104.
\textsuperscript{175} See id. at 51103.
\textsuperscript{176} See id. at 51102.
ments for these concurrences similar to those under the SSA's current nonacquiescence policy. 183

In general, when the SSA determines that a circuit court holding conflicts with the agency's interpretation of the Social Security Act or agency regulation, the agency will acquire to the holding within that circuit at all administrative levels. 184 Before applying the circuit's holding, however, the agency must first publish an Acquiescence Ruling. 185 The Acquiescence Ruling "will describe the administrative case and the court decision, identify the issue(s) involved, and explain how we will apply the holding, including, as necessary, how the holding relates to other decisions within the applicable circuit." 186 Moreover, Acquiescence Rulings must be published in the Federal Register within 120 days of the adverse circuit decision. 187 Likewise, if the agency wants to rescind an Acquiescence Ruling, it must publish its decision in the Federal Register. 188

EPA's new nonacquiescence policies should adopt substantially similar requirements for headquarters concurrences. Like the SSA's nonacquiescence policy, which authorizes local agency officials to apply adverse circuit holdings only after the agency has issued an Acquiescence Ruling, 189 EPA's nonacquiescence policies should require regional offices to receive a concurrence from the appropriate headquarters office before applying adverse circuit precedent. 190 Notably, EPA has already informally adopted this structure for past nonacquiescence decisions in both the Summit and Center for Regulatory Reasonableness cases. 191 However, the Agency broke with this practice in the Regional Consistency Regulations by allowing regional offices to apply adverse circuit precedent without receiving permission from headquarters. According to the Agency, headquarters concurrences would only serve as reiterations of the Agency's default position of intercircuit nonacquiescence. 192

Contrary to this perspective, however, concurrences from headquarters modeled on the SSA's Acquiescence Rulings and published in the Federal Register would not function as redundancies, but could produce more carefully considered nonacquiescence decisions and promote regulatory uniformity. Three rationales support this approach. First, headquarters offices are typically better positioned than regional offices to interpret adverse circuit decisions and tailor the application of adverse decisions to national policy goals. Generally, headquarters offices set national Agency policy, and regional offices implement and enforce that policy. 193 Centralizing nonacquiescence determinations at EPA headquarters more easily enables the Agency to account for its national policy objectives, the political climate in Washington, and circuit decisions outside of the impacted regions when determining how the Agency will apply adverse holdings.

Second, published concurrences from headquarters would foster greater uniformity in administration of the law by establishing one standard for the application of adverse circuit precedent. Alternatively, under the nonacquiescence approach adopted by the Regional Consistency Regulations, each regional office would develop its own standard for how to apply an adverse circuit holding. 194 In circuit jurisdictions such as the Eighth Circuit, which includes states overseen by four different EPA regional offices, this approach invites regulatory uncertainty and inconsistent application of the law. 195 Each regional office may have a slightly different understanding of an adverse holding in the Eighth Circuit. Consequently, industries in Minnesota (Region Five) may be subject to different requirements from industries in Iowa (Region Seven), even though Eighth Circuit precedent governs both states. A centrally published concurrence would eliminate this risk by setting out a national interpretation of the Eighth Circuit's holding and by specifying exactly how the holding should be applied. Each regional office would then be bound by the standard set by EPA headquarters, assuring uniformity across the Eighth Circuit's jurisdiction.

Finally, the publication of concurrences from headquarters in the Federal Register would encourage a fair administration of the law by placing all regulated parties on notice of changes to Agency policy. Under the procedures adopted by the Agency in the Regional Consistency Regulations, regional offices can immediately begin applying adverse circuit holdings without any public declaration indicating a shift in Agency policy. 196 This system risks springing unexpected regulatory burdens on less sophisticated regulated entities that do not meticulously track federal circuit decisions. Meanwhile, more sophisticated entities that do follow circuit rulings will be able to take advantage of favorable shifts in Agency policy sooner than their less sophisticated rivals. While publication of a headquarters concurrence in the Federal Register does not guarantee that all impacted par-

184. 20 C.F.R. § 404.985(a).
185. 20 C.F.R. § 404.985(b).
186. Id.
187. Id.
188. 20 C.F.R. § 404.985(c).
189. See supra note 184.
190. See supra notes 77–80 and accompanying text for a discussion of EPA's general division of labor between regional and headquarters offices.
191. See Amendments to Regional Consistency Regulations, 81 Fed. Reg. 51102, 51110 (Aug. 3, 2016). After the Sixth Circuit's holding in Summit, the Agency's nonacquiescence decision was announced through the Summit Directive signed by the Director of the Office of Air Quality Planning and Standards. See Summit Directive, supra note 121 and accompanying text. Likewise, the two letters challenged in Center for Regulatory Reasonableness were both signed by the Acting Assistant Administrator for the Office of Water. See Petitioner's Appendix at 1–2, Ctr. for Regulatory Reasonableness v. EPA, 849 F.3d 453 (D.C. Cir. 2017) (Nos. 17-1334).
ties will be put on notice of the shift in Agency policy, it at least makes a public declaration of Agency policy accessible to all interested parties.

3. Mechanisms for Deviating From Intercircuit Nonacquiescence

Notwithstanding the presumption of intercircuit outlined in the previous sections, EPA’s nonacquiescence policies should provide the Agency limited flexibility to deviate from intercircuit nonacquiescence in two circumstances: (1) when a regional office requests a concurrence and (2) in a later rescission of a headquarters concurrence.

First, at the concurrence stage, an EPA headquarters office may have political or policy-based reasons for abandoning the presumption of intercircuit nonacquiescence after an adverse circuit decision. For instance, if multiple other circuits have already ruled against the Agency on an issue, a headquarters office may decide to abandon its position once another circuit rules against the Agency. In this scenario, the headquarters office could announce its decision to engage in nationwide acquiescence through a concurrence by following the requirements provided above.

Second, the Agency should be able to rescind a prior headquarters concurrence under proscribed circumstances. Here again, the SSA’s current nonacquiescence policy may serve as a helpful model. Under SSA regulations, the Agency may only rescind an Acquiescence Ruling under four circumstances. First, the Agency may rescind an Acquiescence Ruling when the Supreme Court overrules or limits a circuit decision that was the basis for the Ruling. Second, the Agency may rescind a Ruling when a circuit court overrules or limits its past precedent that formed the basis for the Ruling. Third, a Ruling may be rescinded when Congress enacts a law obviating the need for the Ruling. Finally, a Ruling may be rescinded if the SSA issues new regulations that make the Ruling obsolete.

EPA nonacquiescence policies should adopt similar constraints on the Agency’s discretion to rescind headquarters concurrences. Cabining the Agency’s discretion to overturn past nonacquiescence decisions promotes both consistency and predictability in Agency nonacquiescence decisions by assuring regulated industries that the Agency will not abruptly switch positions. Consider, for instance, a wastewater treatment plant in the Eighth Circuit seeking to construct secondary treatment facilities after Iowa League of Cities. If EPA can rescind nonacquiescence decisions at will, the plant is less likely to rely on the Agency’s nonacquiescence decisions in apprehension of a sudden shift in the Agency’s regulatory stance. On the other hand, if the Agency can only rescind its decision under proscribed circumstances, the treatment plant can more easily rely on the Agency’s nonacquiescence decision because the Agency cannot abandon its former policy without considerable effort.

Conclusion

Both the Regional Consistency Regulations and the recent litigation in Center for Regulatory Reasonableness indicate that nonacquiescence will play a significant role in future EPA policy. Although opinions about the direction of EPA movement break along partisan lines, nonacquiescence is a uniquely non-partisan issue with non-partisan solutions. Both sides of the aisle have a common interest in preserving the federal judicial structure, ensuring the development of environmental law in the federal courts, and promoting regulatory consistency, predictability, and fairness for regulated industries.

The proposal outlined above recommends an approach to EPA nonacquiescence that balances both the interests of the regulated community, the interests of the Agency and federal courts. It is my hope that this Article can serve as a starting point for all policymakers, liberal and conservative, in developing EPA’s future nonacquiescence policies. Hopefully, this Article encourages others to research administrative nonacquiescence. Recent nonacquiescence scholarship is notably lacking, and more scholarship is needed on how both EPA and other agencies might effectively pursue nonacquiescence. The issue of nonacquiescence is neither settled nor fading away, and more work is needed by academics, practitioners, and policymakers, to update Agency policies and bring our understanding into the 21st century.

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197. 20 C.F.R. § 404.985(c) (2016).
198. Id.
199. Id.
200. Id.
201. Id.

202. In keeping with general agency practice giving greater weight to D.C. Circuit decisions, see Estreicher & Revesz supra note 2, at 716, EPA nonacquiescence policies should also permit the Agency to rescind a headquarters concurrence when a D.C. Circuit ruling conflicts with the concurrence.

203. 711 F.3d 844, 43 E.L.R. 20069 (8th Cir. 2013). See supra Section II.B.2.
204. See supra notes 15–20 and accompanying text discussing lack of recent nonacquiescence scholarship.
The Public Trust Doctrine: A Brief (and True) History

James L. Huffman*

In an era of fake news and personal truths, history is in the eye of the beholder. One needs only declare it so, and so it is. Context no longer matters. People and perceptions of the past are discounted, even condemned, in service to modern sensibilities and ambitions. Present-day values and objectives require the retelling of history—confirmed not by careful research and respect for the words and deeds of those whose history we recount, but by repetition of our truths about the past. The ends justify the means.

There are thus two histories of the public trust doctrine. One founded in Anglo-American custom and case law. Another founded in the imaginations of now two generations of advocates in search of a fail-safe guardian of the environment. While I am sympathetic to the cause of environmental protection, I am even more sympathetic to the cause of human freedom. Because the latter requires an unwavering commitment to the rule of law, and because the rule of law requires respect for legal precedent, I believe it is essential that we get the history right.

Many years ago, my colleague, Mike Blumm, described me as the Darth Vader of the public trust doctrine. I would prefer to be thought of as the Luke Skywalker of the rule of law, though having written numerous articles on this theme that are generally referenced as “but see,” if not totally ignored, probably qualifies me to be called Don Quixote. But I continue to tilt at this windmill because I find in the work of those I criticize a deeply ingrained acceptance that legal argument is finally about precedent rather than policy. Why else would they routinely appeal to history in their arguments for judicial reinvention of the public trust doctrine?

For example, a Westlaw search on any given day may reveal upward of 500 articles that reference Justinian in the context of the public trust doctrine. Almost always, particular language from Justinian’s Institutes is quoted as an ancient source of the public trust doctrine. I confess I have not read all 500 articles, but by way of illustration, I will note only some of the Justinian references made by participants in this conference. Prof. Nicholas Robinson: “The Roman ‘public trust doctrine’ derives from Justinian’s Institutes . . . .” Prof. Erin Ryan: “The public trust doctrine is among the oldest doctrines of the common law, with roots in the Justinian Code of ancient Rome, where it was called the jus publicum.” Prof. Mary Christina Wood: “The essential public rights that infuse the trust were expressed in Roman times in the Institutes of Justinian . . . .” Prof. Bradford Mank: “The public trust doctrine has its roots in ancient Roman law and perhaps even earlier. The Institutes of Justinian, which codified Roman civil law, recognized that certain types of property were communal property for the benefit of the general public . . . .” Prof. Melissa Scanlan: “One part of the Corpus, the Institutes of Justinian, contained the origins of the public trust doctrine.” Prof. Alexandra Klass: “In Justinian’s compendium of Roman law, he declared as part of natural law that there were communal rights in the air, running water, the sea and the shores of the sea.” And finally, Professor Blumm, as a coauthor with Professor Wood: “First surfacing in Roman law through the Justinian Code, [the public trust] . . . became entrenched in American law in the 19th century through the process of statehood.” More recently, writ-

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1. See discussion infra.
ing with Aurora Paulsen Moses, Professor Blumm asserted that the public trust doctrine originated in Roman law as an antimonopoly notion: “As the Roman Emperor Justinian explained in a 6th century legal treatise, there are ‘things which are naturally everybody’s . . .’ including ‘air, flowing water, the sea, and the sea-shore.’ English law adopted this Roman law concept in the Magna Carta of 1215, which included a provision promising public uses of navigable and tidal waters for navigation, commerce, and fishing purposes while restricting private monopolies that would interfere with those uses.10

References to Magna Carta, like Blumm’s in his antimonopoly account of the public trust doctrine, are only slightly less common than the aforementioned references to Justinian as part of the claimed historical provenance for an expansive interpretation of the public trust doctrine. As is often the case in the telling of history, the person telling the story has more often relied on the story told by others than on those whose story it is. In the case of scholarly accounts of the history of the public trust doctrine, earlier articles by scholars Joe Sax and Charles Wilkinson are often cited as authority.11 Sax is rightly credited with resurrecting the doctrine from obscurity in a 1970 article in which he, unlike many acolytes, recognized the limits of Roman law as precedent for the judicial intervention he was proposing.12 A year later, he wavered on that conclusion, writing that “[f]or long ago there developed in the law of the Roman Empire a legal theory known as the ‘doctrine of the public trust.’ It was founded upon the very sensible idea that certain common properties, such as rivers, the seashore, and the air, were held by the government in trusteeship for the free and unimpeded use of the general public.”13 After nine more years, Sax reiterated his original position that “neither Roman Law nor the English experience with lands underlying tidal waters is the place to search for the core of the trust idea.”14 Wilkinson also discounted the significance of Roman law as precedent for the modern doctrine, rather contending, with classic Wilkinsonian elegance, that

[t]he real headwaters of the public trust doctrine . . . arise in rivulets from all reaches of the basin that holds the societies of the world. These things were articulated in different ways in different times by different peoples. In some cases, the waters ran deep, in other places the waters ran shallow. But the idea of a high public value in water seems to have existed in most places in some fashion.15

Yet, both Sax and Wilkinson are frequently relied upon in the telling of the mythological history of the public trust doctrine.

In a nutshell, the generally accepted history is that from Justinian’s Institutes through Magna Carta, Bracton, Hale, Blackstone reporting on English law and Chancellor Kent acknowledging the reception of Roman and English law in America, the public has deeply rooted rights in access to and use of resources important to the public welfare. Arnold v. Mundy, Martin v. Waddell and Illinois Central Railroad v. Illinois are cited repeatedly as precedent for present day recognition of a doctrine that will limit the authority of the state to alienate resources while imposing constraints on governmental and private use of those resources.16

As this account of history has gained credence through repetition, the ambitions for the public trust doctrine have grown. Not only is the doctrine said to constrain the public and private use of resources, but also that it empowers the courts to mandate actions by the executive and legislative branches of government, even when those branches have chosen not to act. Emperor Justinian, King John, Henry de Bracton, Chief Justice Matthew Hale, William Blackstone, Chancellor James Kent, Chief Justice Roger Taney (author of Martin v. Waddell’s Lessee and Justice Stephen Field (author of Illinois Central Railroad v. Illinois) would all be in disbelief.

But not so for our late 20th and early 21st century judiciary. In a landmark modern public trust case, the Supreme Court of California, quoting the Institutes of Justinian, wrote that “[f]rom this origin in Roman law, the English common law evolved the concept of the public trust.”17 The New Jersey Supreme Court cited Justinian in stating that “[t]he genesis of this principle [public trust] is found in Roman jurisprudence. . . .”18 The Montana Supreme Court has declared that “[t]he public trust doctrine is of ancient origin. Its roots trace to Roman civil law . . . .”19 The Rhode Island Supreme Court credited the Greek philosopher Gaius, but also Justinian for passing the doctrine on four centuries later.20 The Michigan Supreme Court concluded that “[t]his obligation [the public trust doctrine] traces back to the Roman Emperor Justinian . . . .” The Vermont Supreme Court found that “[t]he public trust doctrine is an ancient one, having its roots in the Justinian Institutes of Roman law.” The Washington Supreme Court concluded that “[t]he principle that the public has an overriding interest in navigable waterways and lands under them is at least as old as the Code of Justinian, promulgated in


12. While it was understood that in certain common properties—such as the seashore, highways and running water—perpetual use was dedicated to the public, it has never been clear whether the public had an enforceable right to prevent infringement of those interests. Although the state apparently did protect public uses, no evidence is available that public rights could be legally asserted against a recalcitrant government.

Sax, supra note 11, at 475.


15. Wilkinson, supra note 11, at 431.


Rome in the 5th century A.D.\textsuperscript{23} A slightly less confident Iowa Supreme Court wrote that “[t]he public trust doctrine is said to be traceable to the work of Emperor Justinian.”\textsuperscript{24} And a very confident United States District Court in Oregon recently concluded that “[a]ppllication of the public trust doctrine to natural resources predates the United States of America. Its roots are in the Institutes of Justinian . . . .”\textsuperscript{25}

Embracing the myth of Justinian, Magna Carta, and more discussed below as today’s truth does serve our purposes better than the truth of the past. But how does one reconcile such mythmaking with a lawyer’s and citizen’s commitment to the rule of law? The rule of law requires adherence to the law as it is, not as we wish it were. Of course, we can change the law in accordance with legal process, and the common law has evolved over time, but we cannot change the law by rewriting history. That even those who would find a vast sea of public rights in the public trust doctrine feel themselves constrained by the rule of law is confirmed by their need to rewrite the history of the doctrine. Why else the routine genuflection to Justinian?

My assignment for this article is to explain the history of the public trust doctrine. But given the pervasive acceptance of the foregoing account, my challenge is as much to correct the record as it is to recount the actual history of the doctrine. Because I have examined both the myth and the history of the public trust doctrine at length elsewhere, I will offer only a truncated account prefaced by a brief explanation of two different claims made in the name of the doctrine.

One claim is that there are certain resources that by their nature require public ownership. When legal title to these resources is held by the state (in the generic sense) the claim is that they cannot be alienated nor used by the state in ways not consistent with the claimed public rights. When title to these resources is in private hands, the claim is either that their acquisition was contrary to law or that their private use is restricted by superior public rights. The other claim is that public trust resources, whether in public or private ownership, are, by public right, available for particular public uses.

In the history that follows, I will demonstrate that neither Roman nor English law support the first claim. I will also demonstrate that although the second claim finds support in both Roman and English law, it supports only clearly defined and limited uses—namely navigation and fishing of specific resources of navigable waters and their associated submerged lands.

\section{Roman Law}

One repeatedly quoted phrase from Justinian’s Institutes serves as the key evidence of a Roman public trust doctrine: “[t]hings common to mankind by the law of nature, are the air, running water, the sea, and, consequently, the shores of the sea; no man therefore is prohibited from approaching any part of the seashore . . . .”\textsuperscript{27} As the ellipses indicate, there is more to the sentence, though I personally have never seen it quoted by those claiming the authority of ancient law. What follows immediately after “seashore” is “whilst he abstains from damaging farms, monuments, [and buildings], which are not in common as the sea is.” So, members of the Roman public had a right to approach the seashore, but only so long as they did not interfere with private property on that seashore. And how, we might ask, did portions of the public seashore become private property? Either by private appropriation or alienation by public authorities. Both were allowed under Roman law.

Description of “the air, running water, [and] the sea” as “things common to mankind” reflected two realities of 3d century Rome: these things were generally abundant relative to demand and were, in their physical nature (“by the law of nature”), difficult to possess, as compared to land. They were \textit{res nullius}, meaning things not owned, or \textit{res communes}, which under Roman law meant essentially the same thing.\textsuperscript{28} Thus, they were things that could be appropriated for private use,\textsuperscript{29} or claimed by governments that could, in turn, grant them to private users. Although Roman philosophers and even the Emperor Justinian might have aspired to the idea of a public right of access to and passage over the seas, the reality of life in the Roman Empire was that “all of the marine and coastal area resources that it was possible for the technology of the Romans to exploit were either in private ownership or were leased to monopolies . . . .”\textsuperscript{30} In other words, the fact of free public access to the sea (and air and running water) reflected not a recognized public right under Roman law, but rather a failure on the part of those who would exercise their right to appropriate unowned resources (\textit{res nullius} or \textit{res communes}) to develop means to effectively enforce any such claims.

Roman law precluded neither the private appropriation of running waters, the sea, or the seashore, nor state alienation of those resources to private parties. This does not mean that the public had no recourse when their use of those resources for navigation and fishing was obstructed by the state or private owners—at least in theory. Roman citizens could seek injunctive relief against obstructions to

\begin{itemize}
\item \textsuperscript{23} Caminiti v. Boyle, 732 P.2d 989, 994 (Wash. 1987).
\item \textsuperscript{24} State v. Sorensen, 436 N.W.2d 358, 361 (Iowa 1989).
\item \textsuperscript{25} Juliana v. United States, 217 F. Supp. 3d 1224, 1253, 46 ELR 20072 (D. Or. 2016).
\item \textsuperscript{26} Huffman, supra note 16, at 14.
\item \textsuperscript{27} Justinian, The Institutes of Justinian 67 (Thomas Cooper ed. & trans., 1841).
\item \textsuperscript{28} Modern advocates of an expansive public trust doctrine will understand \textit{res communes} to mean things belonging to the public in a proprietary sense, but that was not the understanding under Roman law. “[A]ll [of the Roman sources] except Celsus use language in the nature of res communes and res nullius—terms which . . . represent a distinction without a real difference.” Glenn J. MacGrady, The Navigability Concept in the Civil and Common Law: Historical Development, Current Importance, and Some Doctrines That Don’t Hold Water, 5 FLA. ST. U.L. REV. 511, 533 (1975).
\item \textsuperscript{29} “If I drive pikes into the sea . . . and if I build an island in the sea, it becomes mine at once, because what is the property of no one becomes that of the occupier.” James L. Huffman, Why Liberating the Public Trust Doctrine Is Bad for the Public, 45 ENVTL. L. 337, 344 (2015). “If one builds in the sea or on the seashore, although not on his own land, yet nevertheless he by the ius gentium makes it his.” MacGrady, supra note 28, at 533 (quoting E. Ware, Roman Water Law (1905) (translating the Digest, a 50-volume codification of legal writings by Roman jurists)).
\item \textsuperscript{30} Patrick Deveney, Title, Jus Publicum, and the Public Trust: An Historical Analysis, 1 SEA GRANT L.J. 13, 33 (1976).
\end{itemize}
navigation, docking, and shoreline footpaths; blocking or diversion of waters whether or not navigation was affected; and interferences with watering cattle at the shore and could seek restitution for injuries suffered from the building of a pier or breakwater. Although there is reason to question whether these remedies were meaningfully available to the general public, these examples from the Digests do have parallels in the common law. It is possible that the common-law rules emerged with knowledge of Roman law. But it is far more likely, given the role of custom in early English law, that they arose from the same practicalities that created the Roman rules—similar to the practicalities that led English and American courts to adopt a rule of capture for acquisition of title to fish and wild animals.

What is not in doubt, however, is that Roman law allowed for private appropriation of the sea, running waters, and the seashore, and for alienation of those resources by the state where it had previously claimed title. While private title to such resources could be difficult to define and enforce because of their physical characteristics, neither those characteristics nor the perceived public importance of the resources dictated public title. Under Roman law, “things common to all” were those things available for taking and conversion to private property, not things that could only be held in common. Thus, there is no precedent in Roman law for the modern claim that the public trust doctrine precludes alienation of natural resources owned by the state. Perhaps the most convincing evidence of this legal reality is the fact that Roman law recognized and protected private property in the sea and seashore, whether acquired by appropriation or grant from the state. If anything, Roman law may have served as precedent for the longstanding English and American recognition of private title in those same so-called public trust resources.

Another difficulty for those who rely on Roman law as precedent for modern public trust claims is that Roman law made no distinction, until near the end of the Empire, between a public and a personal status of the emperor. That is, the emperor did not exercise sovereignty over some things on behalf of the public (jus publicum) and control of other things in a proprietary capacity (jus privatum). The private interests of the ruler were, by definition, the public interest—or vice versa. Applied to the modern state, such a doctrine of unlimited sovereign authority in the ruler would mean either that the state can alienate nothing or alienate everything. The fact that virtually every private property in the western United States was acquired directly or indirectly from the national government confirms that the former is not the case. And certainly, the latter is not the rule aspired to by advocates for an expansive public trust.

English law would eventually provide better precedent for those who would distinguish between the private and public roles of the ruler, but there is a difficulty in relying on jus publicum constraints on a crown that derives its authority from God as precedent for similar limits on governments that derive their authority from the people. In a government founded on popular sovereignty, the jus publicum is defined by the people and cannot, therefore, be a limit on the exercise of their sovereign powers. Not to mention the irony of appealing to the laws of states in which the Emperor or King could do no wrong.

II. English Law

If not Roman law, then surely English law can supply a distinguished and ancient pedigree to an expansive 21st century public trust doctrine. English law was the law of the English colonies in North America and it was retained by the various states after independence.

As with many assertions of right under modern American law, the public rights of the public trust doctrine are often said to derive from the Magna Carta, notwithstanding that it was largely an agreement by the King to respect the rights of his barons. Two chapters serve as precedent for the public trust doctrine. Chapter 16 provides: “No riverbanks shall be placed in defense from henceforth except such as were so placed in the time of King Henry, our grandfather, by the same places and the same bounds as they were wont to be in his time.” According to Matthew Hale, this provision was a reaction to the King having placed “as well fresh as salt rivers [in defense] for [the Kings’ recreation]; that is, to bar fishing and fowling in a river till [sic] the King had taken his pleasure or advantage of the writ or precept de defensione ripariae . . . .” Not until the 19th century would this provision be understood as a limit on the King’s authority to grant exclusive fisheries. Rather, the objection to the writ

31. See Huffman, supra note 16, at 15.
32. According to Patrick Deveney, “[t]he actual effect of these injunctions was negligible. . . . They were granted ex parte and without investigation into the actual situation; consequently, the interdicts were phrased hypothetically and amounted to no more than a mere statement of the rule the praetor recognized . . . .” Deveney, supra note 30, at 24.
33. Bracton is generally credited with introducing aspects of Roman law to English common law in his 13th century De Legibus et Consuetudinibus AngliœÆ. With regard to Roman law influences on English law as a consequence of Bracton’s many references to Roman law, Sir William Holdsworth observed: “No doubt there is a body of thoroughly English rules; and Bracton differs from Chapter 47 of the 1215 version that provided: “All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be taken with regard to rivers and streams which have been placed ‘in defence’ by us in our time.” MAGNA CARTA Chapter 16, art. 20 (Eng. 1225).
34. See Deveney, supra note 30, at 17.
35. Id.
36. Id.
37. For an account of how Magna Carta “was reinvented as a potent symbol of liberty and justice,” see Alex Lock, Radicalism and Suffrage, Brit. Libr. (Mar. 15, 2015), https://www.bl.uk/magna-carta/articles/radicalism-and-suffrage [https://perma.cc/8EDL-ZCGL].
38. The quoted language is from the 1225 version of Magna Carta. It was derived from Chapter 47 of the 1215 version that provided: “All forests that have been made such in our time shall forthwith be disafforsted; and a similar course shall be followed with regard to river banks that have been placed ‘in defense’ by us in our time.” MAGNA CARTA Chapter 16, art. 20 (Eng. 1225).
39. Wm. & Mary L. Rev. 370, 373 (1888).
40. See generally William B. Stoebuck, Reception of English Common Law in the American Colonies, 10 WM. & MARY L. REV. 393 (1968).
41. See generally William B. Stoebuck, Reception of English Common Law in the American Colonies, 10 WM. & MARY L. REV. 393 (1968).
43. See generally Gann v. Free Fishers (1865) 11 HL. 1305 (Eng.), Malcolmson v. O’Dea (1863) 11 HL. 1155 at 1155–56 (Eng.). Prior to that, Magna Carta
de defensione ripariae at the time of Magna Carta was that it required the riparian owner to repair, at his own expense, roads and bridges in preparation for the King’s fishing expeditions. Chapter 16 protected the landed barons from liability for expenditures in support of the King’s pleasures, but not a public right to fish or navigate on the streams and rivers of the realm.

Chapter 23 provides: “All kydells [fish weirs] for the future, shall be quite removed out of the Thames and the Medway, and through all England, excepting upon the sea coast.” The provision has been relied upon by later writers and some courts as precedent for prohibitions on obstructions to navigation, but its purpose at the time was to prevent the King from blocking fish passage to the private fisheries of upstream barons. While Chapter 23 is sometimes referenced as a foundational precedent for a public right of navigation, it was actually relied upon by Lord Hale as proof that private ownership of submerged lands was allowed.

The conflicts sought to be resolved by Magna Carta reflected preexisting understandings of rights in the resources at issue. It was generally accepted that from the Norman Conquest, the Crown held title to all lands and waters. It was also understood that private parties could acquire title by crown grant. In dispute were which lands and waters had been granted and what rights were reserved in the Crown. In fact, many private holdings had been acquired by appropriation of unoccupied lands, so there was no small dose of fiction in the notion that all private rights were by grant from the Crown. But it was the case that “[b]y the reign of King John almost all of the foreshore and the rivers of the kingdom either were still held by the Crown as private property or had been granted in fee to individual holders.” Magna Carta acknowledged these private claims, but none resembling a general public right of access. Indeed, recognizing the claims of the barons confirmed that the Crown could neither exclude them from their private lands and waters nor mandate that they provide for the King’s access to his private domain, and also that they (the barons) could exclude the public from their private lands and fisheries.

Although 13th century jurist Bracton introduced the Roman idea of public rights in navigable waters to English law, five centuries would pass before an English court would rule that the Crown could not grant exclusive fisheries to private parties. By then, however, most of the valuable fisheries had already been granted. In an unreported case decided in 1632, an English court held that submerged and tidal lands were presumed to remain with the King unless expressly granted. Although not cited by another English court for 163 years, nor relied upon by a jury for another nearly a century after that, this so-called prima facie rule is often referenced today as precedent for presumptive state title to submerged and tidal lands with the suggestion that the rule is founded on a public right in those lands. While presumptive state title to submerged and tidal lands is understood today as recognition of the importance of such lands to the public, the English rule is hardly convincing precedent since it was invented to support the King’s claim to lands long in private use and possession, but without proof of Crown grant. And whatever its nefarious English roots, the prima facie rule recognizes the validity of express government grants of submerged lands.

III. Early American Law

On most questions of English law, 19th century American courts and commentators looked first to William Blackstone’s Commentaries on the Laws of England. But on the law of the sea, their primary source was Lord Chief Justice Matthew Hale’s treatise De Jure Maris. Consistent with 19th century English law, Hale accepted the prima facie rule but was clear that title to submerged lands could be, and in large part had been, acquired for private use. In his discussion of the law relating to the use of navigable waters, Hale identified three categories of coastal property: jus privatuum, the proprietary title in individuals or the Crown; jus regium, the royal right or what we would call police power; and jus publicum. With respect to the latter Hale wrote:

[T]he people have a publick [sic] interest, a jus publicum, of passage and repassage [sic] with their goods by water, and must not be obstructed by nuisances or impeached by exactions . . . . [F]or the jus privatuum of the owner or proprietor is charged with and subject to that jus publicum which belongs to the king’s subjects; as the soil of an highway is, the exception of weares upon the sea-coast[s] . . . make it appear that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark . . . . But in all of these statutes, though they prohibit the thing, yet they do admit, that there might be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty, but also a right of property of soil.

Hale, supra note 40, at 389.

42. Deveney, supra note 30, at 40.

43. Magna Carta Chapter 23 (Eng. 1225), http://www.bsswebsite.me.uk/History/MagnaCarta/magnacarta-1225.html. The same language appears in Chapter 33 of the 1215 version, available at http://www.bsswebsite.me.uk/History/MagnaCarta/magnacarta-1215.html.

44. The exception of weares upon the sea-coast[s] . . . make it appear that there might be such private interests not only in point of liberty, but in point of propriety, on the sea-coast and below the low-water mark . . . . But in all of these statutes, though they prohibit the thing, yet they do admit, that there might be such an interest lodged in a subject, not only in navigable rivers, but even in the ports of the sea itself contiguous to the shore, though below the low-water mark, whereby a subject may not only have a liberty, but also a right of property of soil.
which though in point of property it may be a private man’s freehold, yet it is charged with a publck [sic] interest of the people, which may not be prejudiced or damnified.55

Thus, under English law as understood by 19th century American courts and commentators, there were three aspects to coastal property: the land (possessed by individuals, the Crown, or the state), the right of navigation over and past the land (possessed by the public in the form of an easement), and the power of the state to enforce the public right (the royal right or police power). The pervasive fisheries grants in England confirmed that there was no public right to fish unless granted by the landowner.56 The pervasive private ownership of submerged and riparian lands confirmed that there was no prohibition on crown or state alienation of the land, although the public right to navigate would be unaffected. Neither Hale nor Blackstone mention a public trust doctrine, but by the time of American independence, English law (and thus the law of the American colonies) recognized a public right to navigate on navigable (defined as tidal) waters and a public right to fish in waters where no exclusive fishery had been retained by the crown or granted to individuals.

With American independence, sovereignty shifted from the Crown to the state governments. Several questions relevant to the public trust doctrine had to be resolved as a consequence of there being a new sovereign: First, what laws apply? Second, who owns what, and particularly, who has title to submerged and riparian lands? Lastly, what rights does the public, the true sovereign, possess?

With respect to the laws under which government is organized, the change was revolutionary. The states each enacted constitutions to replace the unwritten constitution under which the Crown and parliament exercised sovereignty. With respect to the powers of the sovereign, there was little change in terms of the scope of powers, but revolutionary change in the inclusion of written bills of rights constraining the exercise of those powers.57 By way of confirming that the common law of England would remain the law, the new states enacted laws confirming the “reception” of English common law, subject, of course, to changes made by the newly sovereign state legislatures.

Among the received English law principles was that everything is owned, either by government or privately.58 With respect to the ownership of lands, the states, as the new sovereigns, succeeded to the Crown’s titles including those held in the name of the former colonies. Because grants previously made by the crown or by the colonial authorities were generally respected, significant portions of the states remained as private property. As one of the compromises leading to the Constitution of 1787, the extensive western land claims of several states were ceded to the new federal government, making the United States a large landowner a dozen years after the Revolution. With the exception of lands required for government facilities and functions, the expectation with respect to both state and federal lands was that they would, in due course, be conveyed or transferred to private owners. Conforming with the retained English common law, submerged lands on non-navigable waters were owned by the riparian owner to the thread of the stream or river,59 and submerged lands on navigable waters were owned by the state unless previously granted to a private party.60 Lord Hale summarized the English rule as follows:

In case of private rivers, the lords having the soil is good evidence to prove he hath the right of fishing, and it puts the proof on them who claim liberam piscarium. But in case of a river that flows and refloows prima facie it is common to all. If any claim it to himself, the proof lieth on his side; and it is a good justification to say, the locus in quo is a branch of the sea, and that the subjects of the king are entitled to a free fishery.61

Thus, where ownership of submerged lands beneath navigable waters was in doubt, retained English law invoked the prima facie rule—absent evidence of prior grant or user, the state is the presumptive owner. But American courts came to view the prima facie rule not as one of evidence, as it was in England, but as a rule of title. This seemingly subtle shift from the English precedents contributed to modern confusion about the relationship between state ownership of submerged lands and the public trust doctrine. Under English law, the evidentiary presumption of state ownership reflected that original title was understood to be in the Crown, meaning that any private claims would require proof of subsequent legal acquisition. As a rule of title, the presumption of state ownership was easily understood to derive from the public’s navigation and fishing rights, notwithstanding that the exercise of those rights was in no way dependent on state ownership as confirmed by Lord Hale62 and as evidenced by the many 19th and 20th century grants of submerged lands for capable of ownership, leaving as little as may be in common, to be the source of contention and strife.

Huffman, supra note 16, at 28 (quoting Browne v. Kennedy, 5 H. & J. 195, 208 (Md. 1821) (Earle, J., dissenting)).

59. “[B]y the rules and authorities of the common law, every river where the sea does not ebb and flow, was an inland river not navigable, and belonged to the owners of the adjoining soil.” Palmer v. Mulligan, 3 Cai. R. 307, 318 (N.Y. Sup. Ct. 1805) (Kent, C.J., concurring).

60. Ex parte Jennings, 6 Cow. 518 (N.Y. Sup. Ct. 1826).


62. Lord Hale’s tripartite division of rights in the coastal area in no way linked the jus publicum to the king (or the state) having title to the submerged or riparian lands. As Hale defined it, the jus publicum is a
private use. Thus, an evidentiary rule invented by the Crown for the purpose of expropriating title from private owners unable to prove title beyond long-term use was transformed into the notion that public rights of navigation and fishing in navigable waters precludes private ownership of submerged lands beneath those waters (and to assert public title to submerged lands long understood to be private property).63

The prima facie rule as a rule of title was applied by Chief Justice Andrew Kirkpatrick in *Arnold v. Mundy*,64 often cited as the foundational case of the American public trust doctrine. The plaintiff claimed the defendant trespassed (and appropriated oysters) on his private oyster beds in the tidal mudflats of the Rariton River at Perth Amboy in New Jersey. The claim of title was based on a survey made under New Jersey law, the plaintiffs having planted and tended the oysters, and a chain of title dating from the twenty-four proprietors of East New Jersey and the King of England. The defendant claimed he had a right shared in common with fellow citizens to take oysters in the navigable waters of the state. The issue, wrote Kirkpatrick (who had already ruled on the case at trial), was “[a]s to the right of the proprietors to convey.”65 Distinguishing between public and common property, Kirkpatrick found that under English law the King may not, “appropriate it to himself, or to the fiscal purposes of the nation, the enjoyment of it is a natural right which cannot be infringed or taken away, unless by arbitrary power; and that, in theory at least, could not exist in a free government, such as England has always claimed to be.”66 Thus, the King’s grant to the twenty-four proprietors via their predecessors in title did not allow for any private rights to the oyster beds in question. The fact that such private grants were pervasive in England and New Jersey alike only indicated the extent of the “usurpation of . . . ancient common rights.”67

The original grants on which the *Arnold* plaintiff based his claim were made under the full force of English law. But, of course, the case was being heard under New Jersey law, which, only a year before Kirkpatrick wrote, was supplemented by the New Jersey Legislature with an act authorizing individuals owning lands adjacent to waters “wherein oysters do or will grow” to plant and have the exclusive right of harvesting oysters.68 Not only did Kirkpatrick ignore the legislative act, but he proclaimed a theory of public rights that explains why the case remains a favorite of those advocating an expansive public trust doctrine:

> Upon the whole, therefore, I am of opinion, as I was at the trial, that by the law of nature, which is the only true foundation of all the social rights; that by the civil law, which formerly governed almost the whole civilized world, and which is still the foundation of the polity of almost every nation in Europe; that by the common law of England, of which our ancestors boasted, and to which it were well if we ourselves paid a more sacred regard; I say I am of opinion, that by all these, the navigable rivers in which the tide ebbs and flows, the ports, the bays, the coasts of the sea, including both the water and the land under the water, for the purpose of passing and repassing, navigation, fishing, fouling, sustenance, and all the other uses of the water and its products (a few things excepted) are common to all the citizens, and that each has a right to use them according to his necessities, subject only to the laws which regulate that use . . . .69

Kirkpatrick acknowledged that the legislature, empowered by the people, may lawfully bank off the water of those rivers, ports, and bays, and reclaim the land upon the shores; they may build dams, locks, and bridges for the improvement of the navigation and the ease of passage; they may clear out and improve fishing places to increase the product of the fishery; they may create, improve, and enlarge oyster beds, by planting oysters thereon, in order to procure a more ample supply; they may do all this themselves at the public expense, or they may authorize others to do it by their own labour, and at their own cost, giving them reasonable tolls, rents, profits, or exclusive enjoyments.70

But he dismissed these powers as “nothing more than what is called the jus regium, the right of regulating, improving, and securing for the common benefit of every individual citizen.”71 “[D]ivesting all the citizens of their common right . . . would be a grievance which never could be long borne by a free people.”72 Kirkpatrick did not address how the powers of a democratic sovereign might be different from those of a King, or how the rights of a free people (public rights as distinct from private rights) can be violated by an act of a legislature elected by those same people.

That question was addressed twenty-one years later in *Martin v. Waddell’s Lessee*,73 albeit by the dissent. On its facts, *Martin* looked very much like *Arnold* with one critical difference. Where the defendant in *Arnold* asserted a public right to take oysters in tidal mudflats, the defendant in *Martin* claimed a private right under grant from the state of New Jersey.74 Although the dispute in *Martin* was between two private claimants, Chief Justice Taney, writing for the majority, relied on *Arnold* to support a ruling for the defendant. With reference to the plaintiff’s claim, Taney cited two Eng-


64. 6 N.J.L. 1, 9 (N.J. Sup. Ct. 1821) (Kirkpatrick, C.J.).

65. Id. at 69 (Kirkpatrick, C.J.).

66. Id. at 72–73 (Kirkpatrick, C.J.).

67. Id. at 73 (Kirkpatrick, C.J.).


70. Id. at 13.

71. Id. at 78.

72. Id. at 13 (alterations in original).

73. 41 U.S. 367, 420 (1842).

74. Id. Defendant’s grant was made pursuant to the Act of November 25, 1824. 1824 N.J. Laws 28 §§ 3–6 (encouraging and regulating the planting of oysters in the township of Perth Amboy).
lish cases in asserting that “the question must be regarded as settled in England, against the right of the king, since Magna Carta, to make such a grant.” It was left to Justice Smith Thompson in dissent to observe that “if the king held such lands as trustee, for the common benefit of all his subjects, and inalienable as private property, I am unable to discover, on what ground the state of New Jersey can hold the land discharged of such trust, and can assume to dispose of it to the private and exclusive use of individuals.” Thompson’s conclusion was that the King, like the state (his successor in title), did have power to alienate the lands in question, making the dispute over which party held the better title to an exclusive right in the oyster beds. Ten years later, in a similar dispute in *Den v. Asi’n of New Jersey*, Taney would cite *Martin* in finding for the state’s grantee, but without any mention of the Crown grant being an infringement on public rights. 

It may seem puzzling that *Martin* is frequently cited as early American precedent for the public trust doctrine given that in both *Martin* and *Den* the court upheld private claims of right in tidal lands. It is true that in *Martin*, for the first time in a U.S. Supreme Court opinion, the concept of a public trust was raised in the context of navigable waters jurisprudence. “The country mentioned in the letters-patent,” wrote Taney, “was held by the king in his public and regal character, as the representative of the nation, and in trust for them.” But this use of the term trust could have either of two meanings. It could mean, as advocates of an expansive public trust doctrine would have it, that the lands in question could not be alienated, or at least were subject to the whatever public easements the trust might guarantee. But the “country mentioned in the letters-patent” would come to constitute the eastern half of the state of New Jersey, most of which was long since alienated and in the exclusive control (subject to the state’s police power) of private owners. So, Taney’s use of the term trust can only mean that a free people (the sovereign people of New Jersey) have a right to have their government rule in service of the public good, including in the disposition and regulation of navigable waters and submerged lands. The grant of letters of patent conveyed to the private and exclusive use of individuals.

The grant could alienate submerged and riparian lands unless doing so was pure dicta given that both parties to the lawsuit asserted an exclusive private right.

It is also noteworthy that eight years after *Martin*, *Arnold v. Mundy* was effectively (though not expressly) reversed by the New Jersey Supreme Court in *Gough v. Bell*. The *Gough* court observed that the *Arnold* ruling was in conflict with several legislative acts which authorized the erection of dams, bridges, piers and docks and the appropriation of oyster beds. For the majority, Chief Justice Henry Green cited Massachusetts Chief Justice Lemuel Shaw, who stated “a navigable stream may cease to be such, by the appropriation of the soil, under legislative authority, to other purposes . . .” and Chief Justice John Marshall, who wrote “[the placing of a dam in a navigable waterway] is an affair between the government of Delaware and its citizens . . .”

Green concluded that

If, by this proposition [no alienation of public trust resources], it is meant only to assert that a grant of all the waters of the state, to the utter destruction of the rights of navigation and fishery, would be an insufferable grievance, it is undoubtedly true . . . But if it be intended to deny the power of the legislature, by grant, to limit common rights or to appropriate lands covered by water to individual enjoyment, to the exclusion of the public common rights of navigation or fishery, the position is too broadly stated.

New Jersey Chief Justice Green’s reasoning in *Gough* was supported four decades later by the Supreme Court in *Illinois Central Railroad v. Illinois (Illinois Central)*. Although the *Illinois Central* case is routinely cited as the holy grail of expanded American public trust doctrine, the Supreme Court did not rule that the state of Illinois could not alienate submerged lands, nor did it extend the public trust doctrine beyond navigable waters or to public uses other than navigation and fishing. Five times in his opinion for the majority in *Illinois Central*, Justice Field reiterated that the state could alienate submerged and riparian lands unless doing so

75. *Martin*, 41 U.S. at 410. Neither of the two cases cited by Taney (Blundell v. Caterall, 106 Eng. Rep. 1190, 1197, 1199–1200, 1203, 1205 (K.B. 1821), and Duke of Somerset v. Fogwell, 108 Eng. Rep. 325, 328–29 (1829)) support his conclusion. In Blundell, the defendant acknowledged the plaintiff’s title to shore lands and adjacent fisheries, claiming only a right of access and to bathe. In applying the prima facie rule, the Somerset court acknowledge the King’s authority to grant exclusive fisheries. See Huffman, supra note 16, at 46–48.

76. Huffman, supra note 16, at 44–45.

77. 56 U.S. 426, 432–33 (1853).


79. Id. at 422 (Thompson, J., dissenting).

80. Id. at 424 (Thompson, J., dissenting).

81. 22 N.J.L. 441 (N.J. 1850).


obstructed the public’s rights to navigate and fish in navigable waters. Indeed, he observed that “[t]he interest of the people in the navigation of the waters and in commerce over them may be improved in many instances by the erection of wharves, docks, and piers therein, for which purpose the state may grant parcels of the submerged lands . . . .” Justice Field also stated that the lands in question were “held in trust for the people of the state, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein, freed from the obstruction or interference of private parties.”

Illinois Central did confirm one apparent difference between the American and English public trust doctrines. In both jurisdictions, the doctrine limited the use of lands beneath navigable waters. Due to England having few navigable waters not affected by the tides, the test for navigability was generally determined by the reach of the tides. American courts were quick to recognize that on a continent with numerous navigable rivers and lakes, the public’s interest in free navigation would not be adequately served if limited to waters affected by the tides. That is, the purpose of the common-law rule would not be served unless navigable waters were understood to include navigable-in-fact waters, whether or not affected by the tides.

While this application of the public trust doctrine to navigable-in-fact waters served the purposes of the doctrine, it had the effect, given the American understanding of the prima facie rule as one of title, of also establishing state title to lands beneath those waters. This explains the state of Illinois’ ownership of the submerged lands off the Chicago waterfront. But the public’s right to navigate and fish in those waters was not dependent on the state holding title. Those rights existed without regard to ownership of the submerged lands and served as a limitation on the use of those lands.

With respect to the nature and extent of public rights in navigable waters, there was nothing new or revolutionary in the Illinois Central decision. It supplies no precedent for an expansion of the land or resources to which the doctrine applies or of the public rights of use of public trust resources. But the decision did contribute to a confusion between the police power and the public trust that has bedeviled public trust law over the ensuing 125 years. Citing Arnold, Justice Field wrote that “[t]he sovereign power, itself . . . cannot consistently with the principles of the law of nature and the constitution of a well-ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right.” In dissent, Justice George Shiras objected that a grant of state property to Illinois Central in no way compromised the sovereign powers of the state. As Shiras explained, the sovereign power of the state is not the same thing as the public trust. The former are the powers inherent in all governments, though subject to any constitutional limits. The latter are the rights held in common by all citizens in the nature of an easement on both private and public properties.

Justice Field further confused the matter by stating that the state’s title to the submerged lands under Lake Michigan “necessarily carries with it control over the waters above them, whenever the lands are subjected to use.” But the state’s responsibility to secure the public’s right to navigate and fish in the lake existed whether or not the state held title to the lakebed.

IV. 20th Century American Law

Since its decision in Illinois Central, the Supreme Court has cited that case in a total of thirty other opinions, twenty-three of which were rendered in the three decades following Illinois Central. In almost all of those opinions, the reference to Illinois Central related not to the public trust doctrine, but rather to disputes over title to submerged lands. Whereas state title to lands under both tidal and navigable fresh waters was often attributed to the public’s rights to navigate and fish in the overlying waters, the court consistently recognized “the consequent right [of the state] to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .”

Id. at 435;

It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the land and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

Id. at 452;

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453;

The state can no more abridge its trust over property . . . like navigable waters and soils under them . . . except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abridge its police powers . . . .

Id.; “The trust with which they are held . . . cannot be alienated, except in those instances mentioned of parcels used in the improvement of the interest held, or when parcels can be disposed of without detriment to the public interest in the lands and waters remaining.” Id. at 455–56.

86. Ill. Cent. R.R. v. Illinois, 146 U.S. 387 (1892). The five instances where Justice Field made clear the state could alienate submerged and riparian lands are as follows:

It is the settled law of this country that the ownership of and dominion and sovereignty over lands covered by tide waters, within the limits of the several states, belong to the respective states . . . with the consequent right to use or dispose of any portion thereof, when that can be done without substantial impairment of the interest of the public in the waters . . . .

Id. at 435;

It is grants of parcels of lands under navigable waters that may afford foundation for wharves, piers, docks, and other structures in aid of commerce, and grants of parcels which, being occupied, do not substantially impair the public interest in the land and waters remaining, that are chiefly considered and sustained in the adjudged cases as a valid exercise of legislative power consistently with the trust to the public upon which such lands are held by the state.

Id. at 452;

The control of the state for the purposes of the trust can never be lost, except as to such parcels as are used in promoting the interests of the public therein, or can be disposed of without any substantial impairment of the public interest in the lands and waters remaining.

Id. at 453;

The state can no more abridge its trust over property . . . like navigable waters and soils under them . . . except in the instance of parcels mentioned for the improvement of the navigation and use of the waters, or when parcels can be disposed of without impairment of the public interest in what remains, than it can abridge its police powers . . . .

87. Id. at 452.

88. Id. at 456.

89. Id. at 467 (Shiras, J., dissenting).

90. The jus regium in Hale or the police power in modern parlance.

91. For Hale, the public rights are the jus publicum and the private rights, whether held by individuals or by the state, are the jus publicum.

92. Illinois Central, 146 U.S. at 452.

on public conveyance of submerged lands. Private ownership can derive from pre-Independence grants by the Crown or other sovereigns, from post-independence grants of territorial lands by the United States, from post-independence grants by the states, or from future grants by the states.

With a single exception, the handful of post-Illinois Central Supreme Court decisions that address the public trust doctrine offer little to those seeking to liberate the doctrine from its historical shackles. In Appleby v. City of New York, the Court made clear that Illinois Central did not preclude state alienation of submerged lands and that the public trust doctrine is one of state, not federal, law. Chief Justice William Taft quoted the following from a New York Court of Errors opinion:

[T]here can be no doubt of the right of Parliament in England, or the Legislature of this state, to make such grants, when they do not interfere with the vested rights of particular individuals. The right to navigate the public waters of the state and to fish therein, and the right to use the public highways, are all public rights belonging to the people at large. They are not the private unalienable rights of each individual. Hence the Legislature as the representatives of the public may restrict and regulate the exercise of those rights in such manner as may be deemed most beneficial to the public at large: Provided they do not interfere with vested rights which have been granted to individuals.

Writing for a unanimous court, Taft would explain that a grant of the entire waterfront of Chicago is different from the grant of submerged lands for the construction of a wharf and other commercial facilities, but his brief quotation from the New York court encapsulated the essence of the public trust doctrine. There is a public right to navigate and fish in navigable waters, and thus a restriction on uses of those waters and their underlying submerged lands that interfere with the public right. Because public rights belong to the people at large and are distinct from the vested rights of individuals, the legislature, as representatives of the public, may alienate submerged lands and authorize the obstruction of navigable waters in whatever manner deemed beneficial to the public—so long as they do not violate vested individual rights. Illinois Central was different (and unusual) in that a grant of the entire harbor could not pass muster as consistent with the public right.

Since Appleby, the Supreme Court has addressed the public trust doctrine in only four cases, all involving issues of title to submerged lands. In Summa Corp. v. California ex rel. State Lands Commission, the court acknowledged in a footnote (citing Illinois Central) that “alienation of the beds of navigable waters will not be lightly inferred,” but recognized that “property underlying navigable waters can be conveyed in recognition of ‘international duty.’” In Phillips Petroleum v. Mississippi, the court ruled that notwithstanding Phillips Petroleum’s recorded titles, years of property tax payments and a chain of title dating back over 150 years to Spanish land grants, the state of Mississippi had title to disputed tide lands pursuant to the equal footing doctrine. In Idaho v. Coeur d’Alene Tribe of Idaho, the court ruled that the Coeur d’Alene Tribe of Idaho was prevented by the Eleventh Amendment from asserting its claim to title to submerged lands under Lake Coeur d’Alene in federal court. Justice Anthony Kennedy’s opinion announcing the 5–4 ruling of the court included an extensive discourse on the public rights in navigable waters. Finally, in PPL Montana v. Montana, the Supreme Court ruled that Montana did not have title to submerged lands under certain non-navigable stretches of the Missouri River, while again opining on the public trust doctrine.

Although all four cases relate to title to submerged lands and therefore are not properly understood as public trust doctrine cases, the last three contribute, in dicta, to the ever-expanding distortions of the history of the doctrine. In Phillips Petroleum, Justice Byron White first ties state title to the public trust and then abandons navigability as the test for the extent of lands affected with a public trust. Because “the states have interests in lands beneath tidal waters which have nothing to do with navigation,” Justice
White concludes that the state of Mississippi has title to the tidelands in question. But the existence of state interests in particular lands, even in navigation over those lands, does not establish state title to those lands. Both private and public lands can be affected by, or subject to, the public trust. Because American law treated the English prima facie rule as a rule of original state title in submerged lands under navigable waters, it should be expected that the extent of the public trust would parallel the extent of state title. But that does not mean that state title necessarily extends to all lands subject to the public trust, or that all lands to which the state holds title are subject to the trust. As Justice Sandra Day O’Connor observed in dissent, the seemingly “belated and opportunistic” claims of the state of Mississippi “could dispossess thousands of blameless record owners and leaseholders of land that they and their predecessors in interest reasonably believed was lawfully theirs.”

Justice O’Connor’s dissent, joined by Justices John Paul Stevens and Antonin Scalia, in Phillips Petroleum, underscores a key reason for environmentalists’ pursuit of an expanded public trust doctrine. By definition, the public rights guaranteed by the public trust are senior and therefore superior to any conflicting claims of private right. For example, the private owner of submerged lands has the right to construct a wharf in a navigable waterway, but not one that obstructs navigation. This is so without regard for the date or terms of the private right because the public right is understood to have existed from time immemorial. No statute, regulation, deed, or other evidence of the creation of the public right is required. Thus, an expansion of either the geographic extent of the public right or the uses guaranteed by that right will, as Justice O’Connor makes clear, unavoidably dispossess private rights holders of property they “reasonably believed was lawfully theirs.” Reasonable beliefs with respect to property rights, or any rights for that matter, are founded on established laws and judicial precedents, not on the ambitions, however estimable, of those who would change the law. That those who advocate for an expanded public trust doctrine acknowledge this commitment to the rule of law is underscored by their undying efforts to rewrite the history, and the precedent, of the doctrine. When they succeed, as the state of Mississippi did in Phillips Petroleum, private property is taken for a public use without just compensation. In rewriting the history of the public trust doctrine, the Phillips Petroleum majority ignored Justice Oliver Wendell Holmes’ caution that “[w]e are in danger of forgetting that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way of paying for the change.”

In Idaho v. Coeur d’Alene Tribe of Idaho, Justice Kennedy describes the state’s title to the submerged lands in dispute as “an essential attribute of sovereignty.” He cites Martin v. Waddell’s Lessee and Pollard v. Hagan, the latter for the proposition “that States entering the Union after 1789 did so on an ‘equal footing’ with the original States and so have similar ownership over these ‘sovereign lands.’” “The principle which underlies the equal footing doctrine and the strong presumption of state ownership,” writes Kennedy “is that navigable waters uniquely implicate sovereign interests.” He goes on to reference Justinian, Bracton, Magna Carta, Hale, Arnold v. Mundy and Illinois Central in support. But if submerged lands “uniquely implicate sovereign interests” and state ownership of those lands is “an essential attribute of sovereignty,” Justice Kennedy fails to explain why the United States could dispose of those lands during the territorial period when “the intention was definitely declared or otherwise made very plain.” In support of his assertion that ownership of submerged lands is an essential attribute of sovereignty Justice Kennedy notes that “[i]n England, from the time of Lord Hale, it has been treated as settled that the title in the soil of the sea, or of arms of the sea, below ordinary high water mark, is in the King,” but he fails to explain why the King’s sovereignty was not compromised when “an individual or a corporation . . . acquired rights in it by express grant, or by prescription or usage.” Justice Kennedy did seek to distance the sovereign states from the crown by asserting that “American law, moreover, did not recognize the sovereign’s rights of private property (jus privatum) that existed in England, apart from the public’s rights to this land (jus publicum).” But this is simply wrong. The reality is that states and the United States have disposed of submerged lands while retaining sovereign jurisdiction over those lands. This makes clear that under American law, like English law, the state has distinct proprietary and sovereign interests in land. While states do have proprietary title to submerged lands under navigable waters, claiming that state ownership of those lands is essential to state sovereignty is like the assertion in Geer v. Connecticut that the states own wildlife. In the words of Justice Marshall writing for the majority in Douglas v. Seacoast Products, Inc., it is “no more than a 19th century legal fiction expressing ‘the importance to its people that a State have power to preserve and regulate the exploitation of an important resource.’” There is much fiction in Justice Kennedy’s historical discourse in Idaho v Coeur d’Alene Tribe of Idaho.

Most recently, in PPL Montana v. Montana, Justice Kennedy writing for a unanimous court again genuflected to the “ancient origin[s]” of the public trust doctrine. But that

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105. Id. at 476.
106. Id. at 492. The state of Mississippi did not seek to protect the lands at issue from environmental degradation. To the contrary, the state sought to benefit from the royalties generated from petroleum development of those lands.
107. Id. at 493.
108. Id.
111. Id.; Pollard, 44 U.S. at 222.
113. Id. at 284–85.
114. Id. (quoting United States v. Holt State Bank, 270 U.S. 49, 55 (1926)).
115. Id. at 284 (quoting Shively v. Bowley, 152 U.S. 1, 13 (1894)).
116. Id. at 286.
117. 161 U.S. 519 (1896).
118. 431 U.S. 265, 284, 7 ELR 20442 (1977) (quoting Toomer v. Witsell, 334 U.S. 385, 402 (1948)).
doctrine, whatever its origins, said Justice Kennedy, was not relevant to resolving the title dispute between PPL Montana and the state of Montana:

Unlike the equal-footing doctrine . . . which is the constitutional foundation for the navigability rule of riverbed title . . . the public trust doctrine remains a matter of state law . . . While equal-footing cases have noted that the State takes title to the navigable waters and their beds in trust for the public . . . the contours of that public trust do not depend upon the Constitution. Under accepted principles of federalism, the States retain residual power to determine the scope of the public trust over waters within their borders, while federal law determines riverbed title under the equal-footing doctrine.159

Despite Justice Kennedy’s recounting of the modern myths of public trust doctrine history in Cœur d’Alene Tribe of Idaho and PPL Montana, the court’s unanimous ruling in the latter case makes clear that much of what is relied upon as Supreme Court public trust precedent is largely dicta. Every “public trust” opinion of the Supreme Court is really about title to submerged lands, not the public trust doctrine. The court’s repeated reminder that submerged lands are held subject to public rights of navigation and fishing is historically correct. But the existence of those public rights is neither contingent on public title to the underlying lands nor the basis of public title to those lands. The only historical link between the law of title to submerged lands and the public trust doctrine is that a presumption of the former and the rationale of the latter is a strong public interest in navigation and fishing on navigable waters.

At this point in the American part of the story, one might reasonably ask why, with a few exceptions, the focus has been on Supreme Court cases. If the public trust doctrine is one of state law, as Justice Kennedy asserts in PPL Montana, shouldn’t we be looking at state court decisions? And if the public trust doctrine is neither the foundation for state title to submerged lands nor confined in its application to submerged lands owned by the state, why have most of the cases discussed involved title disputes rather than claims of public right? It is true that in all the cases discussed, the courts have had reference to public trust rights, but from Arnold to PPL Montana the matter in dispute has been title.

V. Meanwhile, in the State Courts

Only six state court decisions from a total of four states have been mentioned in the foregoing discussion of American public trust law.120 There are, of course, many more, and what would be clear from reading all of them is that, in the words of Professor Sax, “[p]ublic trust law includes, with some variation among states, that aspect of the public domain below the low-water mark on the margin of the sea and the great lakes, the waters over those lands, and the waters within rivers and streams of any consequence.”121

In terms of the narrow geographic scope of the doctrine as propounded by state courts before and up to the time of his 1969 article, Sax’s summary is accurate, although 19th and early 20th century state courts generally described the affected rivers and streams as navigable-in-fact rather than as “of consequence.”122 Sax’s summary also fails to state that the public rights of use in those narrowly defined waters were (as of 1969) similarly narrow—navigation and fishing (with a few cases including bathing).123

But like some of the courts whose decisions he reports, Sax conflates the public trust doctrine with the law relating to title to submerged lands. Indeed, consistent with his ambitions for the doctrine as a tool of judicially enforced “democratization” of natural resource policy-making, Sax asserts that the public trust doctrine also covers parklands “especially if they have been donated to the public for specific purposes.”124 Here, again like some of the courts he cites, Sax confuses the state’s responsibility as a trustee under the law of trusts with the public trust doctrine’s limits on state management and disposition of state-owned submerged lands. The public’s interest in and the states’ authorities and responsibilities for the management and disposition of the public domain, including those arising from trust arrangements, are distinct from, though not unrelated to, the public’s rights and the states’ responsibilities under the public trust doctrine. The two state cases cited by Sax as foundational do not make this mistake. In Commonwealth v. Alger, the Massachusetts court did not question the defendant’s title to tidelands while ruling that the owner is not therefore entitled to obstruct navigation.125 In State v. Cleveland and Pittsburgh Railway, the Ohio court accepted that while a riparian owner was entitled to build on state owned submerged lands, he could not therefore obstruct navigation.127 Both courts recognized that the public rights of navigation and fishing on navigable waters, guaranteed by the public trust doctrine, exist without regard for ownership of the submerged lands.126

119. PPL Mont., LLC, 565 U.S. at 603–04.
121. Sax, supra note 11, at 556.
122. After using this language Sax goes on to say the “[s]ometimes the coverage of the trust depends on a judicial definition of navigability, but that is a rather vague concept which may be so broad as to include all waters which are suitable for public recreation.” Id.
124. Id.
125. Illustrative are Pennsylvania and New York cases in which the state’s trust responsibilities in relation to public parks are said to derive from the public trust doctrine. In re Estate of Ryerss, 987 A.2d 1231, 1236 n.8 (Pa. Commw. Ct. 2009) (“W]hen land has been dedicated and accepted for public use, a political subdivision is estopped from interfering with or revoking the grant at least so long as the land continues to be used, in good faith, for the purpose for which it was originally dedicated.”); Friends of Van Cortlandt Park v. City of New York, 750 N.E.2d 1050, 1053 (N.Y. 2001) (affirming “the principle that parkland is impressed with a public trust, requiring legislative approval before it can be alienated or used for an extended period for non-park purposes”). Both opinions relied on early decisions correctly relying on the law of trusts and not the public trust doctrine. Bd. of Trs. of Phila. Museum v. Trs. of the Univ. of Pa., 96 A. 123, 125–26 (Pa. 1915); Brooklyn Park Comm’sn v. Armstrong, 45 N.Y. 234, 243 (N.Y. 1871).
126. Sax, supra note 11, at 487 (citing Commonwealth v. Alger, 61 Mass. 53, 74–75 (Mass. 1851)).
127. Id. at 487–88 (citing State v. Cleveland & Pittsburgh R.R., 94 Ohio St. 61, 79 (Ohio 1916)).
All of the California and Wisconsin cases Sax offers to illustrate the “contemporary doctrine of the public trust” involve disputes relating to lands beneath navigable water, some over the validity of private claims of title to submerged lands. While many courts have stated in dicta that public trust lands cannot be alienated, Sax correctly concluded that, “there is no general prohibition against disposition of trust properties, even on a large scale.” Illinois Central is “one of the very few opinions in which an express conveyance of trust lands has been held to be beyond the power of the state legislature.” Other cited cases do not assess the validity of private grants but rather involve claims that private uses of submerged lands violate public rights. Where the courts find that public rights guaranteed by the public trust doctrine have been infringed, the offending uses are almost invariably ones that obstruct navigation or fishing in navigable waters.

Although Sax accepted that, with few exceptions, state courts limited their application of the public trust doctrine to circumstances involving threats to public rights of navigation and fishing in tidelands and navigable waters, he began his discussion of the contemporary doctrine with a Massachusetts case, unrelated to waters of any kind. Sax claimed that Gould v. Greylock Reservation Commission was “the first major step in developing the doctrine applicable to changes in the use of lands dedicated to the public interest.” Gould was notable for requiring explicit legislative direction to alter public land use, but it had nothing to do with the public trust doctrine. At issue was a proposal to develop a ski area and associated commercial facilities within a legislatively established, 9,000-acre Greylock Reserve on Mount Greylock. The Massachusetts Supreme Court ruled that the lease and management agreement under which the ski area was to be developed exceeded the Tramway Authority’s legislative grant of authority. Though seemingly a simple case of statutory interpretation, Sax characterized its significance more broadly. He wrote, “[i]t is . . . a judicial response to a situation in which public powers were being used to achieve a more peculiar purpose.” The determinative “peculiar purpose” identified by Sax and the Gould court was the creation of “a commercial venture for private profit” for which the court could “find no express grant . . . of power to permit use of public lands.”

Such rent seeking is too commonplace to be aptly described as peculiar; more peculiar is Sax’s description of Gould as a public trust doctrine case. The court’s opinion never mentions the ‘public trust doctrine’ or uses the term ‘public trust.’ Indeed, the word ‘trust’ appears only in reference to “any trust agreement issued for the protection of bondholders” in the financing scheme for the proposed development. Even distinguished scholar Joe Sax cannot turn a statutory interpretation case into a public trust case simply by describing it as “an important case in the development of the public trust doctrine.” If trust has anything to do with the Gould case, it is the trust that citizens in a democratic republic place in those they elect to represent them. The Gould court was surely correct to demand clear evidence that the people’s interests as declared in the legislature were served by the Tramway Authority, but such oversight of the democratic process has nothing to do with the common-law public trust doctrine.

Sax described the Gould opinion as involving “a simple but ingenious flick of the doctrinal wrist,” but it is really Sax who flicks the doctrinal wrist in an effort to create a new future for the public trust doctrine. Although he acknowledged “a continued reluctance [by state courts] to recognize the public trust,” he saw in it “a considerable opportunity for fruitful judicial intervention . . . .” “Perhaps the most striking impression produced by a review of public trust cases in various jurisdictions,” concluded Sax, “is a striking sense of openness which the law provides; there is generally support for whatever decision a court might wish to adopt.” A decade later, Sax would recognize that, notwithstanding the openness he perceived in the case law, courts were not taking up the invitation to fruitful intervention. The courts, for the most part, were sticking with the common law as it is, rather than as Sax and a growing army of environmental advocates wished it to be.

VI. The Public Trust Doctrine After Sax

The foregoing is as much about what the history of the public trust doctrine was not about, than what it was. What the history of the doctrine actually was could be recounted in a
much shorter article. But because the history of the doctrine has been so often romanticized, if not purposely distorted, and because repetition seems to turn fiction into truth, this article attempts, once again, to set the record straight.

It might be objected that the history discussed is incomplete—that nearly half a century has passed since the last state case mentioned here was decided, which may be a fair concern. What is the history of the public trust doctrine since Professor Sax invited fruitful judicial intervention and the breaking of historical shackles? Despite the best efforts of Sax’s most imaginative acolytes, the geographic scope of the public trust doctrine remains, with rare exceptions, confined to tidelands and lands riparian to and beneath navigable waters. The public’s rights have remained tied, again with rare exceptions, to navigation, fishing and bathing.

Just about the time Sax published his 1969 article, three state courts decided cases that would join the pantheon of progressive public trust decisions. In 1969, the Oregon Supreme Court ruled in State of Oregon ex rel. Thornton v. Hay that, notwithstanding long-vested private title to the dry sand beaches on the Oregon coast, there is a public right of access to those beaches under the common-law doctrine of custom. Although not a public trust case by its own terms, it was very much in the spirit of Sax’s call for judicial creativity given that the Oregon court cited only a single American case as precedent, and that was a very old case from another jurisdiction. Two years later, the California Supreme Court ruled similarly with respect to the dry sand beaches of its state. In Marks v. Whitney, the California court relied on the public trust doctrine to describe the public right of access as

[p]ublic trust easements ... traditionally defined in terms of navigation, commerce and fisheries. They have been held to include the right to fish, hunt, bathe, swim, to use for boating and general recreation purposes the navigable waters of the state, and to use the bottom of the navigable waters for anchoring, standing, or other purposes.

The following year, the Wisconsin Supreme Court ruled in Just v. Marinette County that the public’s rights in the use of submerged lands extended to privately owned wetlands tributary to navigable waters and imposed “a duty [on the state] to eradicate the present pollution and to prevent further pollution in its navigable waters.” While the three cases expand both the geographic reach of the historic public trust doctrine (to dry sand beaches and non-navigable, but tributary wetlands) and the public rights guaranteed by the doctrine (to general recreation and pollution prevention), the doctrine remained firmly immersed in water.

Over the ensuing decades, other state courts embraced the limited geographic and public use expansions reflected in these cases. In 1983, the California Supreme Court ruled, as the Wisconsin court had in Just, that the public trust doctrine applied to non-navigable tributaries of navigable waters where the public rights in those navigable waters were obstructed. The next year, the Montana Supreme Court extended the doctrine’s geographic reach by redefining the test for navigability as all waters that can be used for recreation. This synergetic link between the expansion of the geographic reach of the doctrine and the public uses protected had been underscored several years earlier by the Ohio Court of Appeals, which observed “that the modern utilization of our waters by our citizens requires that our courts, in their judicial interpretation of the navigability of such waters, consider their recreational use as well as the more traditional criteria of commercial use.”

Some state courts have followed the lead of those mentioned above while others have declined to do so. That is the way of a federal system. But among those state courts that have embraced the New Jersey Supreme Court’s view that “[t]he public trust doctrine, like all common law principles, should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit,” none have broken the historical shackles of the doctrine in the ways that Professor Sax envisioned. The doctrine remains firmly linked to water and limited to commercial and recreational use of those waters.

State court decisions extending the public trust doctrine with respect to either geography or public rights are few and far between. The Just court’s conclusion that the public trust doctrine imposes affirmative duties on the state to regulate water pollution derives from a not uncommon confusion of the state’s responsibilities under the public trust doctrine with its authority under the police power. Indeed the Wisconsin Supreme Court would later correct that error, while also restoring the traditional definition of navigable waters, ruling in Rock-Koshkonong Lake District v. State Department of Natural Resources that because the public trust doctrine applies only to navigable waters, the regulation of pollution on uplands had to have been founded on the police power.

In a case widely cited by commentators, the California Court of Appeals stated “that it has long been recognized that wildlife are protected by the public trust doctrine.” In support of this claim, the court quoted from an article of mine, in which I wrote: “Because wildlife are generally transient and not easily confined, through the centuries and across societies they have been held to belong to no one and therefore to belong to everyone in common.” Contrary to the California court’s conclusion, this did not mean that wildlife are subject to the public trust, but rather that wildlife are res nullius and therefore subject to ownership by capture. Although the English Crown, like many monarchs, often

148. 254 Or. 584, 587 (Or. 1969) (finding that the public had acquired an easement to go onto this land for recreational purposes); id. at 598–99 (affirming the trial court in upholding state custom as a source of law).
149. Id. at 597 (citing Perley v. Langley, 7 N.H. 233 (N.H. 1834)).
150. 6 Cal. 3d 251, 259, 2 ELR 20049 (Cal. 1971).
151. 56 Wis. 2d 7, 16, 3 ELR 20167 (Wis. 1972).
152. 350 Wis. 2d 45, 80–81 (Wis. 2013).
155. 300 Wis. 2d 31, 80–81 (Wis. 2013).
156. Ctr. for Biological Diversity, Inc. v. FPL Grp., Inc., 166 Cal. App. 4th 1349, 1361 (Cal. Ct. App. 2008) (as modified on denial of reh’g (Oct. 9, 2008)).
157. Id. at 1361–62 (quoting Huffman, supra note 16, at 86).
claimed ownership for themselves, the state’s authority with respect to wildlife in American law has included the regulation of capture and the protection of habitat pursuant to the state’s police powers. It is those police power authorities that the California court in *Center for Biological Diversity v. FPL* says the state has a duty to perform. Despite the expansive public trust language, the court looks to statutes for definition of the state’s responsibilities and acknowledges the separation of powers obstacles to actually ordering state agencies to take particular actions beyond complying with established process. In a subsequent case, the California Court of Appeals cited *Center for Biological Diversity v. Florida Power and Light* for the proposition that the Department of Fish and Wildlife must “take its public trust responsibilities into account in providing its review and comment,” leading to the conclusion in yet another court of appeals case that there is “no distinction between compliance with the act and the public trust doctrine.” But this reduces the public trust doctrine as applied to wildlife to nothing more than a sort of special appeal for exercise of the police power in pursuit of favored ends.

Because reliance on trust-like language in statutes has the effect of merging the public trust doctrine with the police power, advocates of an expanded public trust doctrine have also looked to environmental rights amendments in a few state constitutions when raising separation of powers obstacles for the courts. In a recent decision, the Pennsylvania Supreme Court ruled, however, “that Pennsylvania has no established public trust principles applicable to Section 27 [the environmental rights amendment to the Pennsylvania Constitution].” Rather, the court looked to the law of trusts in finding that royalties from state oil and gas leases “are the common property of the state and subject to appropriation for beneficial uses as provided by law.”

After stating that “[i]t is not necessary to resort to the theory of Public Trust Doctrine to find a right to the use of surface waters in this State . . . .” That right, stated Turnage, is recognized in the express language of Article IX, Section 3 of the Montana Constitution, which provides: “The people have a right to clean air, pure water, and to the preservation of the aesthetic qualities of their environment; and the protection of the people from . . .”

When asked to find that Article 97 of the Massachusetts Constitution imposes public trust duties preventing a
local government from conveying property acquired by the town as a tax forfeiture, the Massachusetts Land Court relied on the Supreme Judicial Court’s earlier ruling that Article 97 only limited alienation of public property “specifically designated for conservation.” 173 “The public trust doctrine,” said the Land Court, “is expressed as the government’s obligation to protect the public’s interest in . . . the Commonwealth’s waterways [sic]. Under the public trust doctrine, the Commonwealth holds tidelands [sic] in trust for traditional public uses of fishing, bowling, and navigation.” 174 In other words, the Massachusetts public trust doctrine conforms to the historic common law, unaffected by Article 97. The same can be said of Article I, Section 17, of the Rhode Island Constitution. 175 “Under the public trust doctrine,” wrote the Rhode Island Supreme Court in 1999, “the state holds title to all land below the high water mark in a proprietary capacity for the benefit of the public.” 176 “The state’s authority over that land,” wrote the court, is limited by Article 1, Section 17, of the Rhode Island Constitution, which provides that the people shall continue to enjoy “the privileges of the shore, including the right to fish, to swim, and to pass along the shore.” Thus, by its own terms, “rights . . . to which they [the people] have been heretofore entitled” and as interpreted by the Rhode Island Supreme Court, Article I, Section 17, only confirms public rights in the use of state waters always held by the people.

That leaves the Hawaii Constitution as the best hope of those who would rely upon state constitutions for an expanded public trust doctrine. Article XI, Section 9 of the Hawaii Constitution provides:

> Each person has the right to a clean and healthful environment, as defined by laws relating to environmental quality, including control of pollution and conservation, protection and enhancement of natural resources. Any person may enforce this right against any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.

While the Hawaii Supreme Court has held that this provision is self-executing and therefore a basis for private actions to enforce laws intended to protect the environment, 177 it has effectively precluded linking it to the public trust doctrine’s rights of use in trust resources by allowing that any substantive rights are to be determined by the legislature. 178 The court has also limited private rights of actions to those in which the plaintiff has a “personal stake” as distinct from “general constitutional and statutory rights . . . [held] in common with the general public.” 179

The court has, however, found that sections 1 and 7 of Article XI import the public trust doctrine into Hawaiian Constitution law. Section 1 provides:

> For the benefit of present and future generations, the State and its political subdivisions shall conserve and protect Hawaii’s natural beauty and all natural resources, including land, water, air, minerals and energy sources, and shall promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State. All public natural resources are held in trust by the State for the benefit of the people.

Section 7 provides:

> The State has an obligation to protect, control and regulate the use of Hawaii’s water resources for the benefit of its people. The legislature shall provide for a water resources agency which, as provided by law, shall set overall water conservation, quality and use policies; define beneficial and reasonable uses; protect ground and surface water resources, watersheds and natural stream environments; establish criteria for water use priorities while assuring appurtenant rights and existing correlative and riparian uses and establish procedures for regulating all uses of Hawaii’s water resources.

In In re Water Use Permit Applications, the Hawaii Supreme Court held “that Article XI, Section 1 and Article XI, Section 7 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii.” 180 Given the facts in the case then before the court, the significance of this holding in terms of the scope of the public trust doctrine in Hawaii is unclear. Under existing Hawaii law, Sections 1 and 7 were not essential to the court’s ruling. The public trust doctrine was long recognized and its application to trib-

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174. “[Section 9] has both a substantive and a procedural component. First, it recognizes a substantive right to a clean and healthful environment, with the content of that right to be established not by judicial decisions but rather as defined by laws relating to environmental quality.” Second, it provides for the enforcement of that right by “any person” against “any party, public or private, through appropriate legal proceedings, subject to reasonable limitations and regulation as provided by law.” Id. at 409.
178. 9 P.3d 409, 443–44 (Haw. 2000).
utary groundwaters was consistent with an earlier supreme court ruling, "that where surface water and groundwater can be demonstrated to be physically interrelated as parts of a single system, established surface water rights may be protected against diversions that injure those rights, whether the diversion involves surface water or groundwater."182 Groundwater diversions that impacted public rights in surface waters would be as much a violation of the public trust as diversion of surface waters with the same effect. In addition to thus expanding the geographic (hydrologic) reach of the public trust doctrine, the Hawaii court expanded the uses to which the public has a right in public trust waters to include "maintenance of waters in their natural state."183

Notwithstanding that the court’s ruling in In re Water Use Permit Application did not stray from the water-bound roots of the public trust doctrine, the court stated as a holding “that article XI, Section 1 and Article XI, Section 730 adopt the public trust doctrine as a fundamental principle of constitutional law in Hawaii.”184 While Section 7 speaks only to water resources, Section 1 addresses Hawaiian governments’ responsibilities with respect to “natural beauty and all natural resources, including land, water, air, minerals and energy sources.” If the Hawaii public trust doctrine applies to all of that, the liberation of the doctrine from its historical shackles will exceed Professor Sax’s wildest dreams. But both Sections 1 and 7 complicate the matter by recognizing the legitimacy of resource use and development. Section 1 requires Hawaii’s governments to “promote the development and utilization of these resources in a manner consistent with their conservation and in furtherance of the self-sufficiency of the State.” Section 7 mandates the creation of a water resources agency to “set overall water conservation, quality and use policies.” “The state water resources trust,” noted the court, “thus embodies a dual mandate of (1) protection and (2) maximum reasonable and beneficial.”185 In a lengthy discourse the court makes a valiant effort to establish, in the absence of any supporting language in either sections, that mandate 1 (addressing protection) trumps mandate 2 (addressing use).

That is where reading the public trust doctrine into Sections 1 and 7 comes in handy. The court acknowledges that making water policy in compliance with Section 7 requires government to “weigh competing public and private water uses on a case-by-case basis, according to any appropriate standards provided by law.”186 This sounds like the sort of balancing governments must do all the time in making policy, but because this task is constitutionally mandated, governmental compliance is subject to judicial review. How will a court determine whether a government’s policy decisions comply with Sections 1 and 7? By “reading the constitution to establish a ‘rule of reasonableness’ requiring the balancing of environmental costs and benefits against economic, social, and other factors.”187 Taking into account “the constitutional requirements of ‘protection’ and ‘conservation’ but not the constitutional requirements of ‘beneficial and reasonable’ use, “the historical and continuing understanding of the trust as a guarantee of public rights,” and “the ‘zero-sum’ game between competing water uses demands,” governments (and presumably the courts in reviewing what governmental actions), should “bring a presumption in favor of public use, access, and enjoyment.”188 In terms more familiar to judicial review, the public trust content of Section 7, and presumably Section 1, “prescribes a higher level of scrutiny for private commercial uses . . .”189 Just to make completely clear that the balancing inherent in natural resource policy-making will rest finally with the courts, the Court notes that because “[t]he public trust . . . is a state constitutional doctrine . . ., [as with other state constitutional guarantees, the ultimate authority to interpret and defend the public trust in Hawai’i rests with the courts of this state.”190

VII. Why Getting the History Right Matters

Over the half century since Professor Sax first urged that the public trust doctrine could be a tool for “effective judicial intervention,” the doctrine has evolved in directions Sax would praise. But it has not been transformed into the mighty instrument of environmental reform he envisaged. Perhaps, that is yet to come. Certainly, there is no shortage of advocates for the realization of Sax’s vision. That the courts have only occasionally been persuaded to expand the doctrine’s historic reach is testimony to the generally strong commitment of most judges to the rule of law and the separation of powers.

Proponents of an expanded public trust doctrine and those courts that have endorsed expansions over the past several decades appear to agree that history matters to the rule of law. They seem to find it necessary, after all, to reference Justinian, Magna Carta, Illinois Central, and other precedents. Presumably, they recognize that unless one is prepared to forswear the rule of law and embrace judicial governance, there is really no choice but to rely on historical rules and principles. But if the reason for referencing history is to establish that judicial decisions are based on preexisting law and not policy or personal preferences of advocates and judges, it is essential that we review the history accurately. Otherwise, we are only pretending to adhere to the rule of law.

As noted above,191 Professor Sax acknowledged in his 1980 article that the historical shackles of the doctrine were constraining the achievement of his vision for the public trust doctrine as an all-purpose tool in environmental litigation. But he knew that would be a problem from the beginning. In his 1970 article, he wrote, “only the most manipulative of historical readers could extract much binding precedent

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183. In re Water Use Permit Application, 9 P.3d at 448.
184. Id. at 132.
185. Id. at 139.
186. Id. at 142.
187. Id.; see also Save Ourselves, Inc. v. La. Envtl. Control Comm’n, 452 So. 2d 1152, 14 ELR 20790 (La. 1984).
188. Id. at 142.
189. Id.
190. Id. at 143.
191. See discussion supra The Public Trust Doctrine After Sax.
from what happened a few centuries ago in England.” Sax wrote for a second time on the public trust doctrine because the courts had not taken up his invitation to “effective judicial intervention” expressed in his 1980 article. Like Professor Wood’s present-day call for judicial intervention in the name of an imagined “atmospheric trust doctrine,” Sax was urging the courts to intervene not because the law required it, but because the other two branches of government had failed to take what he perceived to be necessary actions.

Both the rule of law and the constitutional separation of powers dictate against such judicial law making. Defenders of judicial expansion of the historic public trust doctrine contend that common-law courts have always had authority to adapt the law to changed circumstances. For example, as noted above, American courts changed the definition of navigable waters from waters affected by the tides to waters that are navigable-in-fact. But that adaptation allowed for the public trust doctrine to serve the same ends on the expansive North American continent as it served in Great Britain. The adapted rule would more likely conform to, rather than conflict with, the reasonable expectations of both owners of submerged lands engaged in commerce and fishing. This is a far cry from what, for example, the Montana Court did in redefining navigable waters to include those susceptible to recreation. By granting access to thousands of miles of waterways from which the public previously could be excluded at the discretion of property owners, the Montana Court upset the reasonable expectations of those property owners while granting welcome, but unexpected, public access. A greater leap would be a judicial ruling that a public right to be free from climate change is merely an adaptation of the public trust right to fish and navigate in navigable waters.

It may be true that climate change is the most pressing issue of our time. It is certainly true that the public has a strong interest in the conservation and wise use of the planet’s finite resources. But as Justice Holmes wrote nearly a century ago in Pennsylvania Coal v. Mahon, we cannot forget “that a strong public desire to improve the public condition is not enough to warrant achieving the desire by a shorter cut than the constitutional way . . . .” The constitutional way, under both the federal and state constitutions, is for the legislature to make the law, the executive to implement the law, and the courts to adjudicate disputes and enforce the law. All of this is to be done in conformance with due process, at the heart of which is allegiance to the rule of law. Neither imagined nor real necessity amends the Constitution or justifies the rule of judges.

Judge Ann Aiken concludes her opinion in Juliana v. United States with the oft-repeated declaration by Chief Justice John Marshall in Marbury v. Madison that it is “emphatically the province and duty of the judicial department to say what the law is.” But no serious student of American constitutional law would understand Chief Justice Marshall’s statement to mean judges have the power to say what the law will be. Rather, Chief Justice Marshall’s point, and the basis for the Supreme Court’s willingness to rule on Marbury’s claim, was that when faced with an alleged conflict between legislative action and the Constitution, it is the responsibility of the courts to determine whether or not the challenged action violates the Constitution—ergo, to say what the law is. Courts are necessarily confined to examination of authoritative legal sources in determining what the law is—namely constitutions, statutes, legal regulations, and precedent, or in other words, history.

The best argument proponents of an expanded public trust doctrine have is that we face serious environmental challenges, those challenges have not been adequately addressed by the legislative or executive branches of government, and the courts must therefore intervene. Professor Sax made this argument in his foundational 1969 article, as has Professor Wood in making the case for her atmospheric trust theory. In an article about Juliana, Professor Wood called climate change a threat of “mind-blowing urgency” requiring judicial intervention because “[t]he international treaty process will probably fail, the legislature will not act, and the president will do too little too late.” However, in a rule of law system with constitutional separation of powers, that argument is not good enough. The history of the public trust doctrine confirms that the public has the right to fish and navigate in navigable waters without regard for ownership of the submerged lands. It is not the province and duty of the judicial department to rewrite history in the name of establishing new public rights.

It is the case, as evidenced in the California, Montana, Oregon, and Wisconsin judicial rulings cited above, that judicial modifications of the traditional common-law public trust doctrine become precedent and law on which future courts can and will rely. Indeed, Juliana is part of a nationwide barrage of lawsuits in search of judges willing to make new law in the name of urgency or necessity. If the appeals are exhausted, new, judicially created, public rights become the law of the land, they will have arisen not from the wisdom of Justinian, but from the imaginations of activist judges. The history of the doctrine will not support such blatant law making, and the rule of law will have suffered.

192. See Sax, supra note 11, at 485.
193. See, e.g., Wood & Woodward, supra note 5, at 636.
194. “The public trust doctrine, like all common law principles,” opined the New Jersey Supreme Court, “should not be considered fixed or static, but should be molded and extended to meet changing conditions and needs of the public it was created to benefit.” Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 309, 2 ELR 20519 (N.J. 1972).
195. See discussion supra Early American Law.
196. 260 U.S. 393, 416 (1922).
197. 217 F. Supp. 3d 1224, 1263, 46 ELR 20175 (quoting Marbury v. Madison, 5 U.S. 137, 177 (1803)).
198. See Sax, supra note 11.
Atmospheric Trust Litigation: Foundation for a Constitutional Right to a Stable Climate System?

Randall S. Abate

The Anthropocene era has triggered a recent wave of judicial and legislative developments in the United States and abroad that seek enhanced government stewardship responsibilities of the atmosphere and natural resources, and legal protections for future generations. The recent case, Juliana v. United States, attempts to secure these protections for future generations in the United States. This promising and hopeful case is attracting national and international attention, and has been characterized as “no ordinary lawsuit”2 and the “trial of the century.”3 This article traces the developments that led to this historic moment in U.S. environmental law and discusses the opportunity that this case may present for potential recognition of a constitutional right to a stable climate system in the United States.

Inherited from English common law, the public trust doctrine4 is the earliest example of environmental rights-based thinking in U.S. environmental law jurisprudence. The concept of government stewardship of resources—and corresponding rights of the people to enjoyment and protection of resources—can serve as the foundation for a broader rights-based jurisprudence in U.S. environmental law. The atmospheric trust litigation theory advanced in the Juliana case builds on this public trust doctrine foundation and provides an opportunity to develop federal constitutional environmental rights and responsibilities in the United States. Regardless of the outcome of the Juliana litigation, Juliana will continue to build public awareness and lay a strong conceptual foundation for climate justice initiatives in federal and state constitutional and legislative contexts.

Part I of this Article discusses the environmental justice movement and how it served as a platform for climate justice litigation, which in turn laid a common-law foundation for atmospheric trust litigation. Part II examines the evolution of atmospheric trust litigation (“ATL”) and discusses how it represents an ambitious but appropriate expansion of the traditional foundations of the public trust doctrine. Part III analyzes how the Juliana case can secure a right to a stable climate system because such a right, like the right to marry,5 serves as a foundation for the enjoyment of other constitutionally protected rights under the Due Process Clause.

I. Evolution of the Rights-Based Approach to U.S. Environmental Law

Environmental law in the United States began as a crusade to protect natural resources. Federal laws mandating government stewardship of resources in national parks and wilderness area were enacted to protect those resources for their intrinsic value and to ensure that humans respect and appreciate nature’s splendor in these areas.6 This preservationist paradigm shifted with the advent of the federal pollution control laws of the 1970s and their “command-and-control”7 regulation of contamination of air, water, land, and

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2. Id. at 1234 (“This is no ordinary lawsuit.”). See also Michael C. Blumm & Mary C. Wood, “No Ordinary Lawsuit”: Climate Change, Due Process, and the Public Trust Doctrine, 67 AM. U. L. REV. 1 (2017).
4. The public trust doctrine provides that the tidelands, and the lands beneath tidal and navigable waterways, are held in trust by the states for the benefit of public interests. Barton H. Thompson Jr., The Public Trust Doctrine: A Conservative Reconstruction & Defense, 15 SE ENVTL. L.J. 47, 67 (2006). The public interests at the foundation of the public trust doctrine were navigation, commerce, and fishing, but those interests later expanded to include other public values. See id. at 67–70 (recreation, environmental protection, aesthetics); Gerald Torres & Nathan Bellinger, The Public Trust Doctrine: The Law’s DNA, 4 WAKE FOREST J.L. & POL’Y 281, 297 (2014) (groundwater, wetlands).
5. For a discussion of Judge Ann Aiken’s reasoning in which she analogizes the right to a stable climate system to the right to marry as comparable foundational fundamental rights, see infra Part III.
7. Command-and-control regulation refers to federal or state government regulators establishing standards to which the regulated community must adhere such as an emissions limitation or a performance requirement. Government
other human health-based objectives. Rather than focusing on the intrinsic value of resources, the regulatory imperative to protect the environment shifted in these laws to address the ways in which human health had become imperiled from the rise in pollution in the industrial age.

Until recently, rights-based thinking was confined to the social justice domain of American jurisprudence, whereas environmental law was governed almost exclusively through “command-and-control” regulation. Although the command-and-control regime was highly successful in cleaning up the air, water, and land from the scourge of pollution that inspired the enactment of these laws, a glaring gap in these laws started to surface in the late 1980s. Human health was not being protected in an evenhanded manner in how these laws were enforced and in the degree to which environmental contamination problems manifested in communities throughout the nation. Minority and low-income communities were bearing a disproportionate share of the environmental contamination burden in the United States, and there was no mechanism in these federal environmental laws to address that inequity. Environmental protection was developing a human face. The environmental justice movement was born.

Environmental justice litigation ensued, seeking to inject a civil rights-based theory throughout the nation by seeking remedies for how contamination burdens were disproportionately burdening minority and low-income communities. These early efforts to apply Fourteenth Amendment protection to these communities ultimately failed in the federal courts, resulting in a devastating setback for the environmental justice movement. However, these advocates had just begun to fight. The effort to constitutionalize environmental rights was an important first step in what would be revisited and conveyed in a more compelling manner under the Due Process Clause just 15 years later in the *Kuluka* case. The constitutional foundation was different (Due Process Clause rather than the Equal Protection Clause) and the plaintiffs were different (youth and future generations, rather than minority and low-income communities), but the underlying theory was the same: the U.S. Constitution should be interpreted to protect environmental human rights through some mechanism and to some degree.

Just a few years after the disappointing setbacks in 2001, environmental justice thinking was embraced to help propel the emerging climate justice movement. Two significant developments in this domain were the Inuit petition and the *Kivalina* case. The Inuit petition before the Inter-American Commission on Human Rights in 2005 can be credited with establishing the connection between climate change impacts and possible human rights violations. Alleging a broad spectrum of human rights violations—ranging from the concrete (rights to property, health, food, and life) to the more conceptual (rights to culture and rights to self-determination)—the Inuit characterized the collective impacts of climate change on all of these rights as a deprivation of their collective “right to be cold.”

Perhaps the most valuable lesson from the environmental justice movement that continues to be relevant today is that the command-and-control approach to environmental problems cannot be the exclusive response to environmental degradation. Common-law and constitutional law theories that address the human rights dimensions of environmental problems need to be included as a weapon in the environmental lawyer’s arsenal. During the peak of the command-and-control era in the 1970s and 1980s, the common-law domain was not entirely supplanted; however, common-law theories in environmental litigation were used that evidence of intentional discrimination is required in private right of action under Title VI.

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8. OpenStax, supra note 7.
10. Environmental Justice is rooted in several social movements within the United States, including the Civil Rights Movement of the 1950s, 1960s, and 1970s; the Anti-Toxics Movement; and the traditional environmental movement. Elizabeth Ann Hill, Environmental Justice: Legal and Policy Implications (2013) (internal citations omitted).
13. A possible federal constitutional amendment addressing environmental protection has been considered in the United States and has been the subject of debate for decades. See generally Robin Kundis Craig, Should There Be a Constitutional Right to a Clean, Healthy Environment?, 34 ELR 11013 (Dec. 2004); I.B. Ruhl, The Metrics of Constitutional Amendments: And Why Proposed Environmental Quality Amendments Don’t Measure Up, 74 NOTRE DAME L. REV. 245 (1999); Richard O. Brooks, A Constitutional Right to a Healthy Environment, 16 VT. L. REV. 1063 (1992).
15. Native Vill. of Kivalina v. ExxonMobil Corp. (Kivalina I), 696 F.3d 849, 42 ELR 20195 (9th Cir. 2012), cert. denied, 133 S. Ct. 2390 (2013).
17. See generally Sheila Watt-Cloutier, The Right to Be Cold: One Woman’s Story of Protecting Her Culture, The Arctic and the Whole Planet (2016) (exploring the parallels between the melting Arctic and the loss of the Inuit’s culture).
intermittently at best, and in limited circumstances.\textsuperscript{18} That approach provided a foundation for a creative combination of public nuisance doctrine and the federal common law of interstate pollution in a line of climate change litigation cases in U.S. courts.\textsuperscript{19}

The Kivalina case was the best opportunity to date for the climate justice movement to gain traction in the U.S. court system. A Native Alaskan Village of 400 residents sued the 24 leading multinational oil and energy companies seeking to recover the estimated $400 million necessary to relocate the village 10 miles inland.\textsuperscript{20} It was predicted that the village would have to evacuate its existing location due to the threat of inundation from sea-level rise.\textsuperscript{21} The case was dismissed on standing and political question grounds in the U.S. District Court for the Northern District of California.\textsuperscript{22} The U.S. Court of Appeals for the Ninth Circuit subsequently denied certiorari in the case.\textsuperscript{23} For purposes of advancing the climate justice movement, however, both the Inuit petition and the Kivalina case can best be characterized as “losing the battle, but winning the war.” The best evidence of the success of these creative climate justice litigation efforts is that the use of these theories to seek governmental and private-sector accountability for climate change impacts continues to this day in the United States and abroad.

The most recent—and potentially most promising—development in this line of public nuisance climate justice litigation is the efforts of cities in California seeking to rely on state public nuisance law to recover for climate change impacts in their cities. The federal displacement doctrine from American Electric Power Co. v. Connecticut applies only to public nuisance claims under federal common law.\textsuperscript{24} This case left the door open for potential recovery on public nuisance claims under state law, which in now being tested in the courts.

In the first of these cases, County of Santa Cruz v. Chevron Corp., the city and county of Santa Cruz, California, sued 29 fossil fuel companies for a wide range of climate change impacts the city and county were experiencing, including sea-level rise, more frequent and severe storms, drought, and heatwaves.\textsuperscript{25} In their complaint, filed in December 2017, the plaintiffs sought compensatory and punitive damages, abatement of the nuisance, and disgorgement of profits for climate change-related injuries from defendants’ production and promotion of fossil fuel products, concealment of known hazards of those products, and championing of anti-science campaigns.\textsuperscript{26} The plaintiffs relied on several state common-law theories to advance their claims, including public and private nuisance, strict liability based on design defect and failure to warn, and trespass. One month after the city and county of Santa Cruz filed against Chevron Corp., the city of Richmond, California, also filed suit against Chevron Corp., asserting the same legal theories.\textsuperscript{27}

This progression of retooling and refining climate justice litigation theory reflects a long, successful history of creativity and persistence on the part of environmental lawyers in seeking recovery for environmental damage under common-law theories. The success of environmental litigation against the asbestos, lead paint, and tobacco industries, and federal and state legislation regulating these activities that followed shortly thereafter, offers compelling and inspiring examples of the creativity and persistence of the environmental bar. Climate justice litigation appears to be the next success in this storied tradition. The only question remaining is how soon that success will materialize.

II. From Public Trust to Atmospheric Trust Litigation

In a related but separate theater in the battle for climate justice, the atmospheric trust litigation (ATL) theory was launched in the wake of the Kivalina litigation. In a bold and ambitious step, the environmental nongovernmental organization, Our Children’s Trust, launched cases throughout the nation with youth plaintiffs leading the charge.\textsuperscript{28} The ATL theory sought to extend the public trust to compel federal and state governmental entities to protect the atmosphere for

19. The Kivalina case built on a progression of cases in the federal courts relying on public nuisance and the federal common law of interstate pollution to seek redress for climate change mitigation and adaption (American Elec. Power Co. v. Connecticut, California v. General Motors Corp., and Comer v. Murphy Oil USA) that laid a foundation for the Kivalina theory to proceed. For a detailed discussion of this line of cases, see generally Randall S. Altate, Public Nuisance Suits for the Climate Justice Movement: The Right Thing and the Right Time, 85 Wash. L. Rev. 197 (2010). For a compelling and heart-wrenching account of the legal and cultural context of the Kivalina litigation, see generally Christine Shearer, Kivalina: A Climate Change Story (2011).
26. Id. at 123.
the benefit of their citizens. Case law had already extended the reach of the public trust doctrine in incremental steps beyond the scope of the uses in the traditional triad (naviga-
tion, commerce, and fishing) to reach the protection of groundwater, wetlands recreation, and wildlife. If courts have recognized coverage of resources beyond the traditional triad, then extending public trust to the protection of the atmosphere may logically follow. The first wave of ATL cases was filed against many state governments and the federal government. These state cases enjoyed some preliminary success and favorable language from the courts, but progress has been slow to materialize. Moreover, the federal case, Alex L. v. Jackson, ran into trouble regarding whether the public trust doctrine could be applied to the federal government. The court concluded that it could not be applied to the federal government and dismissed the case. In the Juliana case, the plaintiffs retooled the theory and added constitutional claims based on the Equal Protection Clause, the Due Process Clause, and the Ninth Amendment.

ATL advances two trends in environmental protection. First, it seeks enhanced duties on regulators to promote stewardship of resources. Second, it seeks to promote rights-based protections of individuals and consideration of future generations’ interests. These two strands are reflected in the Juliana litigation. The young plaintiffs alleged that the federal government’s affirmative actions in establishing a national energy system that accelerates global climate change violated their due process rights to life, liberty, and property and has failed to protect public trust resources.

In 2016, the government filed a motion to dismiss the claims in Juliana, which presented Judge Ann Aiken of the United States District Court for the District of Oregon with an opportunity to rule on the validity of this retooled version of the ATL theory. In a landmark decision, Judge Aiken denied the federal government’s motion to dismiss the case and held that the plaintiffs’ claims against the federal government could proceed to trial.

In the wake of Judge Aiken’s decision, and for the next three years, the federal government made multiple attempts to dismiss the case by employing a wide range of procedural mechanisms. The case was originally set for trial in October 2018, but the Ninth Circuit granted the federal government’s request for a temporary stay of the district court’s proceedings. In November 2018, Judge Aiken issued an order certifying the case for interlocutory appeal to the Ninth Circuit. As this writing is sent to print, the Ninth Circuit heard oral arguments on the interlocutory appeal in June 2019 in Portland, Oregon.

III. Toward a Constitutional Right to a Stable Climate System

The momentum that the Juliana plaintiffs appear to have going into the potential trial in 2019 is promising. This wave of success and optimism would not have been possible without a variety of synergistic developments in related contexts. Rights-based theories for environmental protection have enjoyed many significant victories in the past few years. The public trust doctrine has been used with some success as a rights-based theory for relief in recent climate change cases outside the United States in nations such as Pakistan, the Philippines, and Ukraine. In addition, within the span of one week in March 2017, legal personhood protections were secured for the Whanganui River in New Zealand and the Ganges and Yunama Rivers in India. It is significant for purposes of ATL momentum that the rights-based protections for the rivers in India were secured in court.

Since 2014, the Nonhuman Rights Project (NhRP) has pursued similar efforts in the animal protection domain in a line of ongoing cases seeking to free chimpanzees from unwarranted captivity pursuant to habeas corpus petitions. Like the state-level ATL cases, some courts in these
NhRP cases were receptive to the rights-based legal theory but were not prepared to rule in favor of the plaintiffs’ petitions. Nevertheless, two related rights-based efforts to protect animals from abuse and unwarrented captivity were successful in 2016. First, Ringling Brothers agreed to discontinue the use of elephants in its traveling circus shows,48 curtailing a 150-year tradition; second, SeaWorld agreed to discontinue its orca-captive breeding program49 after its practices came under public scrutiny following a lawsuit and high-profile documentary.50

Most importantly, and in a seemingly unrelated success, the recognition under the Due Process Clause of the right to same-sex marriage in *Obergefell v. Hodges*51 has laid perhaps the most compelling foundation on which the *Juliana* plaintiffs may prevail. Many of the most significant constitutionally protected rights in the United States have been initially derived from Supreme Court jurisprudence, such as a woman’s right to choose in *Roe v. Wade*.52 The Supreme Court has long recognized the Due Process Clause as a gateway for the recognition of unenumerated fundamental rights. The Due Process Clause’s protection of life, liberty, and property—read in conjunction with the Ninth Amendment53—has enabled the Court to recognize evolving societal values and articulate unenumerated fundamental rights without engaging the constitutional amendment process.

The list of unenumerated rights is well-entrenched in the Court’s jurisprudence and spans decades of groundbreaking jurisprudence. This list of rights includes abortion, contraception, upbringing of children, procreation, sexual intimacy, marriage, and most recently, same-sex marriage.54 Admittedly, many of these rights are rooted in privacy-related protections. Trying to connect a constitutional environmental right to the foundation of these privacy-based liberty protections is ambitious and may explain why such efforts have been unsuccessful in the past. But the *Obergefell* decision opened a door for a Due Process Clause foundation for a constitutional right to a stable climate system in a way that the previous line of Due Process recognition of unenumerated rights could not offer.

In what has been widely recognized as a groundbreaking decision, Judge Aiken’s reasoning in *Juliana* provides fertile opportunities for the ATL theory in this case to open the door for possible Due Process Clause protection of the right to a stable climate system. Judge Aiken’s decision laid a valuable foundation for extending fundamental rights jurisprudence under the Due Process Clause to environmental rights. In concluding that the case could proceed to trial, Judge Aiken noted that “Federal courts too often have been cautious and overly deferential in the arena of environmental law, and the world has suffered for it.”55

Judge Aiken noted that “[t]he identification and protection of fundamental rights . . . has not been reduced to any formula.”56 Judge Aiken concluded that the plaintiffs had adequately alleged infringement of a fundamental right, explaining that “[t]o hold otherwise would be to say that the Constitution affords no protection against a government’s knowing decision to poison the air its citizens breathe or the water its citizens drink.”57

Judge Aiken relied heavily on the reasoning in *Obergefell*, which recognized “marriage as a right underly[ing] and supporting other liberties” and as “a keystone of our social order.”58 Relying on Justice Kennedy’s reasoning in his majority opinion in *Obergefell*, Judge Aiken connected the reasoning on same-sex marriage to the stable climate context in *Juliana*.59 In “[e]xercising [her] ‘reasoned judgment,’” Judge Aiken had “no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.”560 Accepting as true plaintiffs’ allegations that the government played a unique and central role in the creation of our current climate crisis; that they contributed to the crisis with full knowledge of the significant and unreasonable risks posed by climate change; and that the Due Process Clause therefore imposes a special duty on defendants to use their statutory and regulatory authority to reduce greenhouse gas emissions, Judge Aiken held that plaintiffs adequately alleged their claim and may proceed to trial on the due process issues.61

The youth plaintiffs also made public trust claims.62 These claims arose “from the application of the public trust doctrine to essential natural resources.”63 The plaintiffs stated that with respect to these essential resources, “the sovereign’s
public trust obligations prevent it from ‘depriving a future legislature of the natural resources necessary to provide for the well-being and survival of its citizens.’

Judge Aiken stated, “the government, as trustee, has a fiduciary duty to protect the trust assets from damage so that current and future trust beneficiaries will be able to enjoy the benefits of the trust.” She concluded that plaintiffs had adequately alleged harm to public trust assets because “[t]he federal government holds title to the submerged lands between three and twelve miles from the coastlines of the United States” and “a number of plaintiffs’ injuries relate to the effects of ocean acidification and rising ocean temperatures.” Judge Aiken also stated that plaintiffs’ federal public trust claims are recognized in federal court and that “the federal government, like the states, holds public assets—at a minimum, the territorial seas—in trust for the people.” Judge Aiken further determined that “[p]ublic trust claims are unique because they concern inherent attributes of sovereignty,” “The public trust imposes . . . an obligation [on the government] to protect the res of the trust”, a significant “feature of that obligation is that it cannot be legislated away.” Thus, “[b]ecause of the nature of public trust claims, a displacement analysis simply does not apply.” Judge Aiken noted that “[a]lthough the public trust predates the Constitution, plaintiffs’ right of action to enforce the government’s obligations as trustee arises from the Constitution.”

Judge Aiken further observed that this action is of a different order than the typical environmental case. It alleges that “[t]he government’s] actions and inactions—regardless of whether they violate any specific statutory duty—have so profoundly damaged our home planet that they threaten plaintiffs’ fundamental constitutional rights to life and liberty.” In addition, “[e]ven when a case implicates hotly contested political issues, the judiciary must not shrink from its role as a coequal branch of government.”

Judge Aiken’s decision could secure a historic victory for environmental rights in the U.S. federal court system, but it has a long way to go. The outcome in Obergefell appeared to be similarly improbable just five years ago as it was working its way through the federal courts, and yet the right to same-sex marriage is now constitutionally enshrined under the Due Process Clause. The Juliana case will likely remain in the U.S. federal courts for years to come as it makes its way to the Supreme Court. In the meantime, the ATL movement will continue to be propelled forward by favorable tail winds in the United States and abroad as it seeks to secure recognition of a constitutional right to a stable climate system under the Due Process Clause of the Constitution.

The momentum from the Juliana litigation has inspired additional promising ATL cases in U.S. state courts. For example, in Reynolds v. Florida, youth plaintiffs sued Gov. Rick Scott for failing to act on climate change and, in many ways, taking actions to deepen the crisis. South Florida is one of the most vulnerable areas in the world to sea-level rise, with the number of high tide floods in Miami Beach increasing by 400% since 2006. The suit alleges that the state government has violated: (1) youth plaintiffs’ rights to due process by violating their rights to life, liberty, and property; and (2) the public trust doctrine as reflected in the ATL theory by allowing and sometimes facilitating fossil fuel companies in their carbon-intensive fossil fuel extraction and production activities, including supporting offshore drilling and imposing strict regulations on solar energy development. See Complaint, Reynolds v. Florida, No. 18-CA-000819 (Fla. Cir. Ct. Apr. 16, 2018), https://static1.squarespace.com/static/571d109b044262/70152fbed0/5ad627f575d1f52d0e0015/152398211494/2018.04.15.Fl.Complaint.FINAL.pdf [https://perma.cc/2XS9-AYLZ]; see also Press Release, Our Children’s Trust, Constitutional Climate Lawsuit Brought by Young Alaskans Heard in Anchorage (Apr. 30, 2018), https://static1.squarespace.com/static/571d109b04426270152fbed0/5ad627f575d1f52d0e0015/152398211494/2018.04.30+Sinnok+v.+Alaska+hearing+press+release.pdf https://perma.cc/ZM59-J9Y9].
From *Mono Lake* to the Atmospheric Trust: Navigating the Public and Private Interests in Public Trust Resource Commons

Erin Ryan

This Article partners a summary of the Mono Lake story—one of the all-time great tales of environmental, property, and water law—with additional historical context, expanded legal analysis, and new reporting on contemporary public trust developments, especially Juliana v. United States and the unfolding atmospheric trust climate litigation. The Mono Lake case and its progeny—in which the public trust doctrine has been applied in contexts ranging from takings litigation to groundwater management to fracking regulation and now to climate change—prompt reflection about the way the public trust doctrine navigates complex conflicts between public and private rights in natural resource commons.

This treatment explores the origins of the public trust doctrine in Roman and British common law through its development in American law, including the U.S. Supreme Court’s 1892 affirmation of the doctrine as a background principle of state law in Illinois Central Railroad v. Illinois. It then introduces the law of private water allocation in the eastern and western United States—riparian rights and prior appropriations, respectively. It considers how the public commons theory that underlies the public trust doctrine collides unapologetically with the privatization theory that undergirds the western doctrine of prior appropriations, enabling academic analysis of how this conflict so famously played out at Mono Lake.

The Article summarizes the historical and judicial elements of the Mono Lake story, including the implications of the court’s decision for understanding the public trust doctrine as a limit on sovereign authority. It summarizes the criticisms that followed from advocates for property rights, the constitutional separation of powers, and environmental concerns, and reviews the doctrinal progeny of the case, including the Scott River extension of Mono Lake to groundwater resources, the Pennsylvania Supreme Court’s application of public trust principles to fracking regulation, and now the atmospheric trust climate litigation emerging worldwide.

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Introduction

It is a pleasure to share with this symposium one of the all-time great stories of American environmental, property, and water law—the saga of National Audubon Society v. Superior Court, better known as the Mono Lake case.1 It recounts the epic conflict over water between the city of Los Angeles and advocates for the Mono Basin, the eastern watershed of the high Sierra Nevada crest at Yosemite National Park, some four hundred miles to the north. In 1983, the California Supreme Court took the first steps toward resolving that conflict by drawing on an ancient common-law doctrine with roots in early Roman and British law—the public trust doctrine—which entrusts the state to manage certain natural resource commons for the benefit of the public. Since then, the Mono Lake case has remained the leading example of modern public trust litigation in the United States, inspiring a new age of public trust advocacy throughout the country and even the world.2

The Mono Lake story prompts reflection about the way the public trust doctrine navigates complex conflicts between public and private rights in natural resource commons, from ancient protections for waterways to contested claims for atmospheric resources. It is a wonderful tale to tell, and it is also very dear to me personally, because it includes the case that brought me into the law. During the aftermath of the California Supreme Court’s decision in the case, I served as an interpretive ranger with the U.S. Forest Service (Forest Service) on the Mono Lake District of the Inyo National Forest. There, it was my job to share this story with the general public, cast as “the Water Issue,” until it eventually inspired me to leave the Forest Service for law school. Some twenty years later, I had the opportunity to write the full history of the case in a law review article3 that I was then invited to turn into a book,4 and I am delighted to be able to share some of that work as part of this public trust symposium.5

In this Article, I partner a summary of the Mono Lake story with additional historical context, expanded legal analysis, and new reporting on important public trust developments, including its application in takings litigation,6 to fracking regulation in Pennsylvania,7 groundwater in California,8 and the atmospheric trust climate advocacy unfolding as this piece goes to press.9 Part I introduces the public trust doctrine itself, including its origins in Roman and British common law. I trace how the public trust doctrine has developed in American law since its reception in the early 19th century, culminating in the U.S. Supreme Court’s 1892 affirmation of the public trust doctrine in Illinois Central Railroad v. Illinois.10 From there, the Article briefly introduces the law of private water allocation in both the eastern and western United States, contrasting how the public commons theory that underlies the public trust doctrine intersects with the privatization theory that undergirds the western doctrine of prior appropriations. The discussion there prepares us to analyze the conflict between them that played out at Mono Lake.

Part II sets the stage for the case that followed, recounting the extension of the Los Angeles Aqueduct to the Mono Basin, the impacts of diversions on the Mono Lake ecosystem, and how they galvanized a determined group of local, state, and national plaintiffs to try and “Save Mono Lake.” Part III begins the legal analysis of the Mono Lake case. After summarizing the parties’ legal arguments, it reviews the California Supreme Court’s groundbreaking conclusion and the legal aftermath that culminated in the Water Board’s decision to limit water diversions as needed to protect Mono Lake.

Part IV analyzes the precedent created by Mono Lake. It explores the nature of the public trust doctrine as a limit on sovereign authority, highlights noteworthy legal innovations in the decision, and reviews doctrinal progeny of the case, including the recent Scott River case extending the Mono Lake rationale to groundwater resources.11 It also summarizes the main schools of criticisms generated by the decision, primarily among advocates for property rights, the separation of powers, and environmentalists. Finally, Part V considers the next generation of public trust advocacy following in the footsteps of the Mono Lake case, especially Juliana v. United States and related climate litigation emerging worldwide.12 The Article concludes with reflections on the role of the doctrine in helping us navigate the public and private interests in public natural resource commons more generally.

I. Legal Doctrines Governing Public and Private Interests in Water Resources

In the Mono Lake case, advocates invoked the public trust doctrine to protect public law interests in the environmental values associated with a navigable waterway against private

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6. See infra notes 75–79 and accompanying text, discussing use of the public trust doctrine to defend takings claims.
10. 146 U.S. 387, 435 (1892).
12. See Juliana, 217 F. Supp. 3d 1224, and the other atmospheric trust cases discussed infra Part IV.
law claims to the actual water within it.\textsuperscript{13} To understand how these public and private interests came into conflict at Mono Lake, it is important to understand the different legal doctrines that govern water resources in the United States. This part introduces the public trust doctrine, which establishes public rights and responsibilities in water, and more curiously, the law of private water allocation, which assigns private rights to use the water within those waterways. And as the Mono Lake conflict demonstrates, these two sets of laws will not always play nicely.

Part I.A introduces the public trust doctrine and its historical origins, tracing the public trust principle from ancient Rome, through early British law, to its formal reception in the United States. Because the law of private allocation also plays an important role in the Mono Lake conflict, Part I.B. provides a light introduction to the primary doctrines of private water allocation: the riparian rights doctrine of the eastern United States, inherited from British law, and the prior appropriations doctrine that evolved later in the western United States.

A. Legal Origins of the Public Trust Doctrine

Modern public trust principles, which assign state responsibility for natural resources held in trust for the public, are most famously associated with American law.\textsuperscript{14} However, the public trust doctrine has roots in some of the oldest doctrines of the common-law tradition—\textsuperscript{15}—with many dates accounting its origins to early British law, and some all the way back to ancient Rome.\textsuperscript{16} This section presents the conventional historical account of the development of the modern public trust doctrine.

I. The Roman and Byzantine Empires

In the 6th century A.D., the Byzantine Emperor Justinian I set to work codifying Roman Common Law of the previous era, for the combined purpose of fortifying legal education and restating the law for enforcement purposes.\textsuperscript{17} In the Institutes of Justinian, published in 533, he documented the \textit{jus publicum}, a principle addressing the common ownership of certain natural resources: “By natural law, these things are the common property of all: the air, the running water, the sea, and with it, the shores of the sea.”\textsuperscript{18} Thousands of years later, it is hard to know exactly how these principles helped govern the Roman Empire,\textsuperscript{19} but this commanding early statement of public commons has redounded through common-law jurisprudence ever since, in both judicial decisions and constitutional affirmations.\textsuperscript{20} Analogous principles of public commons ownership, especially pertaining to waterways, also appear in civil law countries with legal codes that draw on ancient Roman law, including France, Spain, and other post-colonial nations with related legal systems.\textsuperscript{21}

In the Mono Lake story that is the focus of this Article, we will hear a lot about the intersection of these public trust principles with water resources, and indeed, the doctrine is most often invoked in application to waterways. But before moving on, we might pause here for a moment to acknowledge the very first item in Justinian’s list—“the air”—because that will become an important element in the modern public trust developments reviewed toward the end of our story, now that advocates are deploying public trust principles in the context of climate governance.\textsuperscript{22}

2. The Magna Carta and Forest Charter

Some \textit{jus publicum} principles were later incorporated into early British law, beginning with the Magna Carta. In 1215, King John of England issued the Magna Carta (Great Charter), promising his rebellious barons that he and all future sovereigns would operate within the rule of law.\textsuperscript{23} Although the Magna Carta was unsuccessful in the first instance, it eventually provided the foundations of the modern English legal system, and it is credited as a progenitor of Western democracy and constitutional law.\textsuperscript{24} In addition to declaring the sovereign subject to the rule of law, the Magna Carta also set forth rights to speedy justice, to trial by jury, and against unusual punishments.\textsuperscript{25} It also incorporated into English law certain principles of Roman common law, including elements of the \textit{jus publicum}. For example, Chapter 23 of the Magna
Carta required the removal of all weirs in the Thames and Medway Rivers “throughout all of England” that interfered with fishing or navigation. The Magna Carta was negotiated between a proto-public commons over navigable waters for these purposes.

The Charter of the Forest, added to the Magna Carta in 1217 by King Henry III, further protected public rights to access natural resources on certain undeveloped royal lands (not just forests), and it remained in effect for centuries thereafter. Re-establishing traditional rights of public commons that had been eroded by William the Conqueror, the Forest Charter promised that the King would not interfere with commoners’ rights to graze animals, forage, plant crops, and collect lumber on open lands subject to Forest Law. Notably, this law still governs the New Forest territory in southern England. While these provisions do not necessarily follow from the Justinian references to common property in air, water, and coastlines, they do express an early affirmation of what would develop into more modern public trust principles of public rights in natural resource commons.

3. British Common Law

Early British common law also made reference to public trust principles in a series of cases and authorities affirming sovereign authority over submerged tidelands. In the 1611 Royal Fishery of River Batne case, the Kings Bench held that while the beds of nonnavigable waterways could be privately held, navigable waters were owned by the sovereign for public use. Sir Matthew Hale, in his renowned 1670 Treatise on English Maritime Law later described sovereign ownership of tidelands in his account of the three different kinds of coastal land: (1) that under the royal right (or police power); (2) that available for public navigational access; and (3) that which was privately owned.

Critics of this conventional historical account, including Prof. James Huffman, have pointed out that unlike contemporary statements of the public trust doctrine, Chapter 23 of the Magna Carta protected only British nobility, rather than the general public, and that the King’s prerogatives under British common law did not include trust-like responsibilities until the 19th century. Others, including Profs. J.B. Ruhl and Tom McGinn question the relevance of the Justinian statement of the Jus Publicum to actual Roman legal practice. Indeed, it may be that the ideals of the Forest Charter come closer to the public trust principles that would ultimately evolve in the United States. Nevertheless, the early American courts that adopted the public trust doctrine referred copiously (and perhaps defensively) to its roots in British law.

B. Reception in the United States

The principle of sovereign authority over submerged lands was received in the United States through the individual states’ reception of British common law, and it began making appearances in litigation in the early 19th century. The American version of the doctrine expanded to embrace not only the submerged lands beneath coastal tidelands, those of principal value in Britain, but also those under other large navigable waterways to which there were no true British analogs, including America’s Great Lakes and enormous rivers. In this way, the American public trust doctrine developed beyond its British origins, although early American cases frequently referred back to Roman and English common law for support. This section reviews the reception of the doctrine by individual states in their common law and constitutions, and its recognition by the Supreme Court in Illinois Central Railroad v. Illinois.

1. American Common Law

In the 1821 case of Arnold v. Mundy, one of the first to refer to the public trust doctrine’s Roman and English roots, the Supreme Court of New Jersey quoted Justinian and the various limitations on the English Crown in holding that the land and resources beneath navigable water—here, oyster beds—were common property. The plaintiff property owner had purchased a farm adjacent to a navigable river, where he planted oysters and staked off the resulting bed. He subsequently sued a defendant for taking oysters from this bed, but the defendant claimed that he and all citizens of the state had the right to take oysters where they would be naturally present in a navigable riverbed. The Chief Justice determined that the plaintiff must have title to the oyster...

26. Magna Carta, Chapter 23 (Eng. 1215). See also Michael C. Blumm & Courtney Engel, Proprietary and Sovereign Public Trust Obligations: From Justinian and Hale to Lamprey and Oswego Lake, 43 YL. REV. 1, 8–9 (forthcoming 2019) (discussing the implementation of Justinian public trust principles in the Magna Carta).

27. Magna Carta, Chapter 33 (Eng. 1215). See also Blumm & Courtney Engel, supra note 26, at 9 (discussing the implementation of Justinian public trust principles in the Magna Carta).


30. See Nield, supra note 28, at 303.


35. Ruhl & McGinn, supra note 16.


37. Id.

38. For additional historical account of the early American public trust doctrine, see Ryan, supra note 4, at Chapter II.


40. 146 U.S. 387 (1892).

41. 6 N.J.L. 1, 71–72 (1821).

42. Id. at 65–66.

43. Id.
bed to prevail in his suit, but that he could not satisfy this requirement, as his private rights extended only as far as the landward side of the high-water mark.

The Chief Justice found that the land under navigable water is considered common property, and that proprietors have no more power than the English crown to convert lands beneath them into private property. Referencing Justinian, the Chief Justice characterized common property as "the air, the running water, the sea, the fish, and the wild beasts," and held that title to these were in the sovereign, to "be held, protected, and regulated for the common use and benefit."

Writing with strong tones of judicial gravity, he concluded:

The sovereign power itself, therefore, cannot, consistently with the principles of the law of nature and the constitution of a well ordered society, make a direct and absolute grant of the waters of the state, divesting all the citizens of their common right. It would be a grievance which never could be long borne by a free people.

With these words, he became the first American jurist to tie the public commons element of the public trust doctrine to the orderly functioning of democracy.

2. Affirmation by the U.S. Supreme Court

The Supreme Court first formally invoked the public trust doctrine in 1842, in the case Martin v. Waddell, where it affirmed the sovereign ownership of navigable waters and their submerged resources, resolving another dispute over oyster beds. The Court held that proprietors claiming title to New Jersey oyster beds under a charter originally dating back from the British King Charles to the Duke of York could not prevail, because even a royal grant was subject to the public trust rights of common fishery for the common people. In defending its conclusion, the Court referenced the presence of the doctrine in English law as far back as the Magna Carta:

[T]he lands under the navigable waters [within the limits of the charter] passed to the grantee, as one of the royalties incident to the powers of government; and were to be held by him in the same manner, and for the same purposes, that the navigable waters of England and the soils under them, are held by the Crown.

The policy of England since Magna Carta—for the last six hundred years—has been carefully preserved to secure the common right of piscary for the benefit of the public.

[I]t would require plain language in these letters-patent [to the Duke of York] to persuade . . . [the Court] that the public and common right of fishery in navigable waters, which has been so long and so carefully guarded in England, and which was preserved in every other colony founded on the Atlantic borders, was intended, in this one instance, to be taken away.

Three years later, in Pollard v. Hagan, the Supreme Court reached a similar conclusion on the basis of the same principles in resolving a dispute over the ownership of submerged lands in Alabama and Georgia. The Court rejected an argument that territory in Alabama that had originally been ceded by Spain should not be subject to the British rule of sovereign ownership of submerged lands. Instead, it determined that when Alabama was admitted to the Union, it entered on "equal footing" with neighboring states, such as Georgia, and thereby succeeded to all the rights of sovereignty, jurisdiction, and eminent domain as these other states. The Court held that the land under navigable water was reserved to the states, and that new states have the same sovereignty and rights over navigable waters as did the original states.

By the late 19th century, it was well established among American courts that the state holds navigable waterways in trust for the public. The Supreme Court made its most definitive treatment of the public trust doctrine in Shively v. Bowlby, an 1894 case quieting title to submerged lands beneath a state-sanctioned wharf on the Columbia River in Oregon. The Court traced the detailed history of the doctrine from British law through the American Revolution and forward since then, affirming that:

[T]hese submerged lands, of singular value for commerce, navigation, and fishery, were held by the English King for the benefit of the public, [and] those rights survived the settlement of the colonies, and upon the American Revolution, became vested in the original States.

When territory came into the U.S. by whatever means, the same public ownership of submerged lands below the mean high-water mark passed to the U.S., held ‘for the benefit of the whole people and in trust’ for the new states that would be carved from this territory.

In so doing, the Supreme Court affirmed the general provenance of American lands submerged in navigable waters (below the mean high-water mark) as owned by the sovereign and held in trust for the benefit of the public.

52. Id. at 413–14.
53. 44 U.S. 212 (1845).
54. Id. at 228–29.
55. Id. at 223, 228–29.
56. Id. at 230.
58. 152 U.S. 1, 57 (1894).
59. Id.
60. Id. at 14–15, 49.
3. **Illinois Central Railroad v. Illinois**

Although *Shively v. Bowlby* was the Supreme Court’s most definitive treatment of the public trust doctrine, its most famous statement of the doctrine came from a decision issued two years earlier, the 1892 case of *Illinois Central Railroad v. Illinois*.61 There, the Court provided a crisp statement of the traditional public trust principles of American law:

[T]he State holds the title to the lands under navigable waters . . . in trust for the people of the State, that they may enjoy the navigation of the waters, carry on commerce over them, and have liberty of fishing therein freed from the obstruction or interference of private parties.62

In this seminal decision, the Court not only affirmed sovereign authority over submerged lands, but clarified the nature of its obligation to the public as trustee of those lands.63 And indeed, the *Illinois Central* case demonstrates just how powerful the public trust obligation can be. To give a sense of the enormous power packed in this seemingly simple doctrine, consider the striking facts of the case. Boiling the story down to its core: in 1869, the state legislature conveyed the bed of Chicago Harbor—the most valuable submerged lands in all of Lake Michigan—to a private railroad, presumably to spur economic development.64 The people of Illinois were dubious. While they hoped economic development would eventually confer public benefits, the gift smacked of patronage and cronyism, and it generated considerable public outrage.65 When both the *Chicago Tribune* and the *Chicago Times* condemned the conveyance, legislative support for the deal began to collapse, and the Illinois House and Senate created committees to investigate the possibility of corruption.66 When the legislative session finally turned over, one of the new legislature’s first acts was to repeal the old legislature’s gift to the railroad.67 Now the railroad was the outraged party, and this famous litigation ensued.

In court, the railroad argued that the new legislature lacked the authority to repeal the Chicago Harbor conveyance made by the prior legislature.68 The conveyance was extremely valuable, and ordinarily, neither the government nor any other owner can simply “take back” a thing of value this way.69 However, the state defended itself by deploying public trust principles as a novel legal shield. Conceding that there might have been a legal problem if there really had been a legal gift, the state argued that in this case, there was not an actual problem, because—thanks to the public trust doctrine—there had not been any actual gift.70 The state effectively acknowledged that it may have looked as though the previous legislature had conveyed the bed of Chicago Harbor to this private party, but argued that in fact, no such thing had happened.71 The bed of Chicago Harbor was subject to the public trust doctrine—held by the state in trust for the public—and therefore, as a matter of law, could not be conveyed this way.72

The state argued that the previous legislature had lacked the power to make a gift of lands encumbered by the public trust.73 Such an act would be *ultra vires*—literally, beyond the authority of the state—at least without taking more heroic measures to clarify why such an unusual conveyance actually did accord its public trust obligations.74 As a result, there was no actual gift, and accordingly no harm in repealing it, and therefore, no legal foul. The Supreme Court agreed with the state’s argument, affirming the public trust doctrine as a foundational element of state natural resources law.75

In doing so, *Illinois Central* enshrined the public trust doctrine among what later Fifth Amendment takings jurisprudence would refer to as the “background principles” of state common law.76 In the early 1990s, the Supreme Court clarified that takings liability applies whenever state regulation obstructs all economically viable use of private property, no matter what public interests are at stake—unless the challenged regulation is already among the “background principles” of state property law that limit an owner’s reasonable expectations about how they should be able to use their property, such as the common law of nuisance.77 The Court’s old recognition in *Illinois Central* that the public trust doctrine is a foundational element of state law has renewed importance since its newer takings jurisprudence expanded potential

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61. 146 U.S. 387 (1892) [hereinafter *Ill. Cent. R.R.*].
62. Id. at 452.
64. *Ill. Cent. R.R.*, 146 U.S. at 438–39 (making “a grant by the State, in 1869, of its right and title to the submerged lands, constituting the bed of Lake Michigan”).
66. Id. (describing public outrage over the conveyance); id. at 889–90 (describing legislative committees created to investigate potential corruption).
67. Id. at 911 (indicating the legislative turnover that followed); *Ill. Cent. R.R.*, 146 U.S. at 449 (“On the 15th of April, 1873, the legislature of Illinois repealed the act.”).
69. Indeed—as any self-respecting toddler would know, “No take backies!”
71. See id. at 439.
72. See id. at 439, 453.
73. See id. at 453 (“The trust devolving upon the State for the public, and which can only be discharged by the management and control of property in which the public has an interest, cannot be relinquished by a transfer of the property. The control of the State for the purposes of the trust can never be lost . . . .”).
74. Id.
75. Id.
within the United States, even where the doctrine is also part of state common law. Some constitutionalized versions look very similar to the common-law statement of the public trust doctrine affirmed in Illinois Central. For example, Florida’s Constitution includes a provision that recognizes public ownership of critical water commons and confers traditional protections for submerged lands beneath navigable waters:

The title to land under navigable waters, within the boundaries of the state, which have not been alienated, including beaches below mean high water lines, is held by the state by virtue of its sovereignty, in trust for all the people.

Alternatively, some state constitutions have taken a more modern approach, applying public trust principles to additional resources, or expanding protections for specific purposes. For example, Article I, Section 27 of the Pennsylvania Constitution states:

The people have a right to clean air, pure water, and to the preservation of the natural, scenic, historic and esthetic values of the environment. Pennsylvania’s public natural resources are the common property of all the people, including generations yet to come. As trustee of these resources, the Commonwealth shall conserve and maintain them for the benefit of all the people.

Pennsylvania’s super-statutory public trust doctrine, known as the Environmental Rights Amendment to the state constitution, recently played a pivotal role in a spectacular legal debate over the regulation of hydraulic fracturing (fracking), which is commonly used to extract natural gas from the rich Marcellus Shale resources of the state. In a move that surprised commentators, a plurality of the Pennsylvania Supreme Court invoked the doctrine sua sponte to overturn a state statute that had prevented municipalities from regulating the location of fracking operations through zoning. A few years later, a clear majority of the same court confirmed that Pennsylvania is obligated to manage its state parks and forests, including the oil and minerals therein, as a trustee in accordance with the public trust principles of the Environmental Rights Amendment. They reasoned that the clear language expressly affirms both the right of

4. State Constitutions

Finally, it is worth noting that public trust principles have been incorporated into a number of state constitutions

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79. Esplanade Properties, LLC v. City of Seattle, 307 F.3d 978 (9th Cir. 2002) (affirming the city’s refusal to allow construction of residences on an elevated platform above tidelands, because the public trust doctrine vitiated any entitlement by the owner to build there); McQueen v. S.C. Coastal Council, 580 S.E.2d 116 (S.C. 2003) (holding that the public trust doctrine properly blocked tidelands development without compensation, even when the lands at issue became submerged after the owner took title); Nat’l Ass’n of Homebuilders v. New Jersey, 64 F. Supp. 2d 354 (N.J. 1999) (rejecting a takings challenge to a state agency rule requiring developers of waterfront property to provide walkways along the water, because the public trust doctrine prevents owners from claiming any entitlement to exclude).
80. Casitas Mun. Water Dist. v. United States, 543 F.3d 1276 (Fed. Cir. 2008) (dismissing a takings claim by a California irrigator required to create fish passage lanes to satisfy the Endangered Species Act, but stating in dicta that the public trust doctrine would not have barred the claim); Tulare Lake Basin Water Dist. v. United States, 49 Fed. Cl. 313 (2001) (in an opinion by the same judge as Casitas, rejecting the state’s public trust “background principle” defense against a takings claim by California irrigators after water delivery under a water contract was temporary suspended while the state complied with restrictions under the Endangered Species Act).
81. Ryan, The Historic Saga, supra note 3, at 571, 574.
82. See Ryan, supra note 4, at Chapter VIII (The Evolving PTD) (describing different versions of the doctrine in different U.S. states). For example, most states protect public access to submerged lands below the high water mark, but New Jersey protects access to dry sand beaches as well. Matthews v. Bay Head Imp. Ass’n, 471 A.2d 355, 363 (N.J. 1984).
83. See Ryan, supra note 4, at Chapter VIII (The Evolving PTD).
84. Ryan, The Historic Saga, supra note 3, at 572–73. See also Barton H. Thompson Jr., Environmental Policy and State Constitutions: The Potential Role of Substantive Guidance, 27 Rutgers L.J. 863, 866 (1996) (“The ‘public trust’ doctrine plays a constitutional role in most states even though less than a handful of states refer to the trust in the constitution itself.”).
85. Klass, supra note 14, at 714.
people to enjoy these public natural resources and the Commonwealth’s obligation to maintain them.\textsuperscript{91}

Constitutionalized versions of the doctrine have thus provided additional means of protecting public trust resources and expanded recognition for new public trust values beyond those traditionally protected at common law. However, scholars like Alexandra Klass have expressed concerns that the constitutionalization of public trust principles may displace common-law versions of the doctrine, undermining the further development of public trust principles through traditional common-law processes.\textsuperscript{92} Some states, such as Idaho, have committed the public trust doctrine to statute specifically to prevent the further development of the common-law doctrine.\textsuperscript{93}

C. The Law of Private Water Allocation

This introduction to the public trust doctrine reveals it as a public commons-based theory of public rights and responsibilities with regard to navigable waterways, and perhaps other critical natural resources.\textsuperscript{94} However, at least when applied to American waterways, the public trust doctrine is inevitably destined to collide with a wholly separate body of law, and one that is often based on a contrasting theory of private rights. The law of water allocation, by which rights are granted for the use or extraction of water from public commons waterways, enables individuals and groups to claim water for specific private purposes. Especially in the western United States, these allocation laws are generally based on a privatization model.\textsuperscript{95}

The problem becomes immediately obvious: the water governed under both sets of laws is, after all, the same exact water. The water to which individuals and other entities can obtain private rights of use under the law of water allocation is the very same water that makes up the waterways protected by the public trust doctrine. Yet, these two bodies of law—the public trust doctrine and the law of private water allocation—are doctrinally orthogonal to one another. Each developed independently of the other, as though they have neither a legal nor a substantive relationship at all.\textsuperscript{96}

I. Riparian Rights

Like the public trust doctrine, there is regional variation in the law of private water allocation. Water allocation is a feature of state law, and there is a notably different valance to water allocation law in the eastern and western United States. Eastern states generally follow a modern version of the original British doctrine of “riparian rights,” which assigns correlative rights for reasonable use of water resources among all riparians along a watercourse.\textsuperscript{97} Under the riparian rights doctrine, reasonableness is contextual, and generally determined by the total set of individual demands for the water.\textsuperscript{98} Many riparian rights jurisdictions have modernized the doctrine to de-privilege riparian ownership, allowing water to be exported from the riparian tract and treating all users under the same rubric for assigning claims.\textsuperscript{99}

In most respects, however, both traditional and modern riparian rights regimes take a public commons approach to allocating the resource. These laws treat the water subject to allocation as a public commons or a common pool, allocating correlative rights in water in which users’ rights are limited by the rights of other users.\textsuperscript{100} As a rule, everybody has to share.\textsuperscript{101} For example, in 1888, the Connecticut Supreme Court in \textit{Mason v. Hoyle} enjoined one mill owner from impounding a stream to the detriment of other down-stream mill operators.\textsuperscript{102} Emphasizing the reciprocal nature of rights and duties among riparian claimants, the court articulated the five core principles for “reasonably” allocating water under the common-law “reasonable use” doctrine of riparian rights:

1. All riparians have an equal opportunity to use the stream;
2. No owner may use his own property so as to injure another;
3. Adjudicators should consider the character and capacity of the stream;
4. The burden of foreseeable shortages should be allocated fairly among all riparians; and
5. Customary practices provide a foundation for evaluating “reasonableness.”\textsuperscript{103}

Modern riparianism jurisdictions continue to apply the correlative spirit of reasonable use riparianism in considering the interests of all claimants on a waterway before assigning definitive rights to any. For example, in the 2005 case of \textit{Michigan Citizens for Water Conservations v. Nestle Waters North America}, the Michigan Court of Appeals enjoined some—but not all—of the Nestle Corporation’s claims to withdraw water from a stream that also served boating,

\textsuperscript{91} Id. at 916.

\textsuperscript{92} Klass, supra note 14, at 699.


\textsuperscript{94} See Michael C. Blumm & Mary Christina Wood, \textit{The Public Trust Doctrine in Environmental and Natural Resources Law} (2013) (discussing application of the public trust doctrine to other resources, including wildlife and atmospheric resources). See also Juliana v. United States, 217 F. Supp. 3d 1224, 46 ELR 20072 (D. Or. 2016).

\textsuperscript{95} Ryan, \textit{The Historic Saga}, supra note 3, at 576–78.

\textsuperscript{96} Id. at 576.


The wetter eastern states... view the right to use water as an attribute of the ownership of riparian land. This is primarily a torts regime, prohibiting one riparian landowner from inflicting unreasonable harm upon another. In contrast, the arid western states historically have followed the prior appropriation doctrine, protecting the right to use water according to temporal priority of use.

\textsuperscript{98} Id. at 407.

\textsuperscript{99} Ryan, \textit{The Historic Saga}, supra note 3, at 576.

\textsuperscript{100} Id.

\textsuperscript{101} Id, supra note 97, at 407.

\textsuperscript{102} 14 A. 786 (Conn. 1888); 56 Conn. 255 (1888).

\textsuperscript{103} Id.
swimming, fishing, wildlife, and aesthetic purposes. The court emphasized its responsibility to fairly allocate water to preserve as many different uses of a waterway as possible.105

2. Prior Appropriations

Most states in the American West, however, allocate water rights under an appropriative rights regime based on priority in time—essentially ‘first come, first served.’106 Under this pure “prior appropriations” doctrine, rights to appropriate water from the public commons are not correlative, and earlier claims are not diminished by the needs of later-comers.107 Whoever is the first to take a defined quantity of water out of the watercourse and put it to “beneficial use”—defined as domestic or economically viable use—can claim a right to continue withdrawing the same amount of water for the same purpose, potentially indefinitely, and excluding all others who come later.108

In contrast to riparian rights, the prior appropriation doctrine takes a privatization approach to resource allocation—the very opposite of the public commons approach.109 Not only does the doctrine reward early movers, granting them a protectable right to exclude those who seek to establish claims afterward, it rewards those who fully remove the water they claim from the waterway, leaving none behind for other uses. At least historically, an appropriator must literally withdraw water from the stream to perfect a claim; appropriative rights were not available for instream uses like fishing, swimming, for wildlife, or aesthetic purposes.

For example, in the 1882 case of Coffin v. Left Hand Ditch Co., the first case to formally apply the new doctrine of appropriative rights, the Colorado Supreme Court affirmed the rights of an irrigator removing water from the stream over the claims of a downstream riparian farmer.110 The irrigator was the first to actually remove water from the watercourse, creating a right to continue appropriating that water for himself regardless of the needs of a downstream user who had failed to perfect an appropriative claim.111 Similarly, in Empire Water & Power v. Cascade Town, the U.S. Court of Appeals for the Eighth Circuit applied the Colorado prior appropriation doctrine to hold that the defendant hydroelectric power company could continue to divert water to its reservoir, even though it would fully dewater the Cascade Creek Canyon and waterfalls around which the plaintiff resort town economy was centered.112

Some modern appropriative rights jurisdictions have added additional statutory criteria, including a public interest analysis, that require consideration of additional factors before new rights are assigned, but in most respects, the heart of the analysis remains the traditional rules of prior appropriations.113 Many jurisdictions have also provided greater statutory protections for instream flow values, mitigating the enormous pressure to withdraw from the stream in order to receive a legally protected water right—but even so, very few states treat these the same way they do conventional appropriations, and only three allow private parties to hold them.114 A handful of especially confusing states, including California, allocate water under both riparian and appropriative rights regimes simultaneously.115

Accordingly, while the public trust doctrine requires the state to protect navigable waterways in trust for the public, the doctrines of private water allocation—especially Western prior appropriations—govern how the state gives away the waters within them. And while the public trust doctrine and riparian rights doctrine are grounded in a public commons theory of waterways, emphasizing correlative rights and shared duties, the prior appropriations doctrine tends toward a pure privatization model—first in time rights to exclude others.

For these reasons, a conflict between the public trust doctrine and private water allocation law was inevitable, especially in the arid West. There, state law applies a privatization approach to the allocation of water rights for water taken from waterways at the very same time that it applies a public commons approach to protect the underlying waterways—which are composed of the very same water.116 These contrasting approaches set in motion a legal collision that was inevitable—and the conflict erupted most spectacularly at Mono Lake.

II. Building the Los Angeles Aqueduct

The Mono Lake case reached the California Supreme Court in the early 1980s, but the crisis that led to the case began almost a century earlier, when the growing city of Los Angeles first began to run out of water.

Potable water has long been considered “wet gold” in Los Angeles, the second most populated desert city on Earth.117

105. Id.
106. Klein et al., supra note 97, at 406 (“[T]he arid western states historically have followed the prior appropriation doctrine, protecting the right to use water according to temporal priority of use.”).
107. Id. at 408.
108. Id. at 408–09.
110. 6 Colo. 443 (1882).
111. Id.
112. 205 Fed. 123 (1913).
114. Barton Thompson et al., Legal Control of Water Resources 216 (5th ed., 2015) (noting that while most states now allow some sort of appropriation to protect instream flows, only Alaska, Arizona, and Nevada allow private entities to claim them).
115. In California, the owners of land abutting watercourses hold some traditional riparian rights, which coexist with the more abundant appropriative rights that are unconnected to riparian land ownership but subject to similar requirements of reasonable and beneficial use. See Thompson et al., supra note 114, at 200 (discussing California’s hybrid system of water law); see also Cal. Const. art. X, § 2 (confirming the protection of riparian rights and discussing the requirement of beneficial use). However, prior appropriations remains the defining doctrinal approach in the state. See Thompson et al., supra note 114, at 208 (explaining how the doctrines interact with one another in California); see also John Franklin Smith, The Public Trust Doctrine and National Audubon Society v. Superior Court: A Hard Case Makes Bad Law, or the Consistent Evolution of California Water Rights; 6 Glendale L. Rev. 201, 207–09 (1984) (outlining the history of California’s dual water rights system).
117. Ryan, The Historic Saga, supra note 3, at 578. Among desert cities worldwide, only the Egyptian city of Cairo boasts a larger population. See Marc Reisner,
Located on the southern California coast, Los Angeles is one of the largest cities in the United States, with a metropolitan population of about ten million people.\(^{118}\) The Los Angeles River runs through the city, now mostly encased in concrete, but has approximately enough water to supply a population of only a few hundred thousand—a pretty large overdraft.\(^{119}\) For that reason, moving water to Los Angeles has been a California state priority since the turn of the last century, when groundwater supplies began to run out.\(^{120}\)

Los Angeles lies in the arid bottom of the state, far from the many Sierra Nevada rivers that furnish northern Californians with more abundant water resources.\(^{21}\) However, three snaking aqueducts converge at the city, delivering redirected water to the large population centers in and around Los Angeles.\(^{122}\) The Los Angeles Aqueduct, tapping the eastern slope of the Sierra Nevada and Tehachapi Mountains, runs four hundred miles north from Los Angeles all the way to Mono Lake, which is due east of San Francisco, near the California-Nevada state line.\(^{123}\) Today, it is flanked by the Colorado River Aqueduct, which brings water from states to the East, and the California Aqueduct, which taps the western slope of the Sierra Nevada Range. But the Los Angeles Aqueduct is the oldest, the most colorful historically, and doubtless the most notorious of the three,\(^{124}\) and with it begins our story.

What follows in Parts II and III summarizes the Mono Lake story, told in even greater detail elsewhere,\(^{125}\) to bridge the historical and doctrinal material of Part I with further analysis of public trust issues and new litigation developments in Parts IV and V. This part recounts the arrival of the Los Angeles Aqueduct, first in the Owens Valley and then the Mono Basin. It introduces the Mono Basin ecosystem and reviews the devastating impacts of water diversions through the Aqueduct to Los Angeles.

### A. The Owens Valley

The Los Angeles Aqueduct now ends at Mono Lake, but that was not always so. The first place the city looked to for water was the Owens Valley, an unlikely oasis in the southern California desert, roughly halfway between Los Angeles and Mono Lake. The first few chapters of this story center on the Owens Valley and the devastating impacts that water diversions posed for the local environment and economy there over the first half of the 20th century. I have previously chronicled these chapters in vivid detail,\(^{126}\) because they are of cinematic proportions (indeed, this part of the story inspired the film noir classic, Chinatown,\(^{127}\) starring Jack Nicholson). While this Article will not re-tell the full Owens Valley story that is detailed in prior work,\(^{128}\) I’ll give just enough overview to provide needed context for the Mono Lake chapters that follow.

The ten-cent overview is that state and city leaders were seeking new water supplies for Los Angeles, and they realized that there was water to be had some two hundred miles to the north, in a valley capturing rainwater from two surrounding mountain ranges.\(^{129}\) The Owens Valley lies in a high-elevation desert, carved out by the improbably robust flow of the Owens River. The river winds south between the White Mountains to the east and the Sierra Nevada to the west, culminating in the vast but shallow Owens Lake.\(^{130}\) A thriving agricultural community dependent on the river developed alongside it, the only sweet water in the region.\(^{131}\) Los Angeles engineers realized that they could divert this water south to Los Angeles using only the force of gravity, rather than relying on the kind of expensive pumps that would be required to move water from elsewhere.\(^{132}\) However, city leaders accurately predicted that the community would be unlikely to just hand the water over when Los Angeles announced its interest. Instead, they decided to trick local community members into giving up their coveted water rights.\(^{133}\)

Agents for the city approached Owens Valley farmers pretending to be farmers, and they gradually bought up most of the farmland and associated water rights surrounding the Owens River. When it was too late to stop them, they started diverting all available surface water south to Los Angeles.\(^{134}\) When they needed still more water, they began pumping ground water below their land and sent that south as well.\(^{135}\) Before the local community had really figured out what was afoot, the vast majority of the region’s water was being redirected to Los Angeles, and the Owens Valley was

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\(^{120}\) Ryan, *The Historic Saga*, supra note 3, at 578.


\(^{125}\) For the full story, see Ryan, *The Historic Saga*, supra note 3, at 578–603; Ryan, supra note 4, at Chapters III-V.

\(^{126}\) Id. at 580–89.

\(^{127}\) CHINATOWN (Paramount Pictures 1974).

\(^{128}\) See supra note 124.

\(^{129}\) Resiner, supra note 117, at 61–63.

\(^{130}\) Id. at 61.

\(^{131}\) Ryan, *The Historic Saga*, supra note 3, at 583.

\(^{132}\) Id.


\(^{134}\) Id.

\(^{135}\) Id.
effectively divested of its water.\textsuperscript{136} Once the local farmers did figure things out, they were enraged; they famously dynamited the Aqueduct, and the National Guard was called in to restore order.\textsuperscript{137} Headline-making drama ensued, but at the end of the day, Los Angeles secured the water rights, the Owens River was diverted, and Owens Lake at its terminus was drawn dry.\textsuperscript{138}

Today, there is an expansive salt sump where the majestic Owens Lake once anchored the valley and its wildlife, including vast populations of migratory birds that no longer appear.\textsuperscript{139} The Owens Valley tragedy is compounded by the fact that the exposed lakebed is composed of fine alkali salts that are toxic to breathe. These very fine particulates are constantly being churned up by the strong winds whipping off the vertical escarpment of the eastern Sierra Nevada, forming causing alkali dust storms.\textsuperscript{140} In fact, the Owens Valley often ranks as the most polluted place in the United States by particulate matter standards.\textsuperscript{141}

\section*{B. The Mono Lake Basin}

Some forty years after the Aqueduct first began tapping the Owens Valley, Los Angeles leaders realized that the growing city still needed more water.\textsuperscript{142} They also realized that there was a wealth of additional, unappropriated water in the next watershed up from the Owens Valley, just two hundred miles to the north—the Mono Lake Basin. This Section briefly introduces the unique place that became the focus of the famous public trust litigation in the Mono Lake case.

Mono Lake drains the eastern slope of the high Sierra Nevada crest, just east of Yosemite National Park.\textsuperscript{143} To call it a lake is almost a misnomer; it is more of an inland sea, twice the size of the city of San Francisco, five times deeper than the Great Salt Lake in Utah, and three times saltier than the Pacific ocean.\textsuperscript{144} Estimated to be between one and three million years old, it is roughly tied with Lake Tahoe as the oldest continuous lake in North America.\textsuperscript{145} Like Owens Lake, Mono Lake is a terminal lake, which means that water flows into, but there is no way for the water to leave except by surface evaporation.\textsuperscript{146} For those three million years, water carrying trace elements and minerals has flowed into the basin and then evaporated off the surface, leaving those minerals behind to form a hypersaline body comparable to parts of the Great Salt Lake.\textsuperscript{147} As a result, the Mono Lake Basin is not only a very beautiful location, it is a unique ecosystem, the site of important scientific research, and home to important communities and cultures, including the Kutzadika’a Paiute who have lived there for generations.\textsuperscript{148}

Mono Lake is part of a unique ecosystem. The lake is too salty for fish to survive, so the enormous lake contains not a single species of fish—but they are plentiful in the feeder creeks that carry snowmelt down from the adjacent Sierra Nevada into the lake basin.\textsuperscript{149} Instead, the lake is home to trillions of tiny brine shrimp, a species that exists only at Mono Lake.\textsuperscript{150} Brine shrimp populate the lake so thickly that if you took a coffee cup and scooped out some summer lake water, there could be as many as ten or even twenty shrimp in your cup.\textsuperscript{151} The lake is also home to hordes of tiny alkali flies, which are tasty as pupae and have long been a dietary staple of the local Kuzedika’a Paiute community.\textsuperscript{152} The ecosystem is thriving, but simple: the flies and shrimp survive on the base of the lake’s food chain, benthic algae, and virtually everything else in the ecosystem—including the native people—survives by eating the flies and shrimp.\textsuperscript{153} There is not much stabilizing redundancy if any of the basic elements are compromised.

Mono Lake is thus a giant bowl of shrimp soup, deliciously garnished with alkali flies. As such, it attracts enormous flocks of migratory birds making their way along the Pacific Flyway from as far north as the Arctic and as far
south as Latin America.\footnote{Kevin Neal, TED Case Studies, The Los Angeles Aqueduct and the Owens and Mono Lakes (Mono Case), http://archive.today/jfHR [https://perma.cc/LX3Q-NRRS].} The lake provides them a critical sanctuary during the vast desert expanse of their journey, allowing them to replenish themselves before continuing on for many more hundreds of desert miles.\footnote{Mono Lake Comm., Birds of the Basin: The Migratory Millions of Mono, http://www.mono lake.org/about/ecobirds [https://perma.cc/3LG7-JALJ].} Millions of individuals from some three hundred species of birds come to the lake.\footnote{See generally Mono Lake Facts, supra note 144.} One of the islands in the lake is the breeding ground for more than 85% of the California’s population of California gulls.\footnote{See History: Evidence of Recent Eruptions, MONO LAKE COMM, http://www.mono lake.org/about/geovolcanic [https://perma.cc/JR6H-N73V].} The freshwater creeks that feed the lake are also important parts of the ecosystem, providing critical regional fisheries, riparian habitat for wildlife, and local cultural values.\footnote{See generally Mono Lake Facts, supra note 144.}

Just south of the lake is the youngest volcanic range in North America: the Mono Craters, a short chain of 10,000-feet-high volcanoes.\footnote{NASA, Discovery of “Arsenic-Bug” Expands Definition of Life, NASA SCIENCE NEWS, Dec. 2, 2010, http://science.nasa.gov/science-news/science-at-nasa/2010/02dec_monolake/ [https://perma.cc/VCA8-MWNC].} These volcanoes are relatively recent, and the chain ploughs right through the lake, creating the black and white islands within it.\footnote{Id.} The volcanically influenced chemistry and geology of the lake is so unusual that it has been an important research destination for studying underwater volcanism, and NASA has even conducted research at Mono Lake to imagine what life on other planets with unusual terrestrial profiles might look like.\footnote{Id.}

Unlike Los Angeles, however, the Mono Basin is not a major population center. The tiny town of Lee Vining is located on the western edge of Mono Lake, just below the 13,000-feet peaks of the High Sierras.\footnote{See Lee Vining, California, CITY-DATA.COM, http://www.city-data.com/city/Lee-Vining-California.html (last visited Apr. 17, 2015).} The town was home to only 300 year-round residents when I lived there, but there is some commercially valuable local industry. A nearby pumice mine harvests commercially valuable rock from the Mono Craters.\footnote{US Bureau of Land Mgmt, Map of Mono Basin, available at http://www.blm.gov/style/medialib/blm/ca/pdf/bakersfield/geology.Par.25066.File.dat/ovn07_geology_maps.pdf.} The brine shrimp plant on the western edge of the lake harvests Mono Lake shrimp to be sold as freeze-dried fish food.\footnote{See, e.g., Mono Lake, 658 P.2d 719; Brine Shrimp: Mono Lake’s Unique Species, supra note 150.} But the most important regional industry of all are the surrounding public lands, including national and state parklands that bring hundreds of thousands of visitors to the Mono Basin each year from around the world, all to enjoy the stunning vistas, unique wildlife, fascinating geology, and cultural history of the area.\footnote{Id.}

### C. The Mono Basin Extension

When I was a grunt-level Forest Service ranger at Mono Lake, I lived in the Ranger Station Barracks at the foot of Lee Vining Canyon, the glacially carved route into the High Sierra peaks at Tioga Pass. But practically across the street, there was an official and foreboding sign that warned, “City of Los Angeles—Private Property!” Indeed, many decades before, Los Angeles had already managed to acquire much of the privately available land there, in order to secure the riparian rights associated with this land and lay claim to the remaining water in the Basin under the prior appropriations doctrine.\footnote{Ryan, The Historic Saga, supra note 3, at 596–98.}

The city accomplished this feat during the 1940s, in a much less notoriety way than it had acquired the Owens Valley water rights. Unlike the Owens Valley story, there were no tricks or foul play, and no city agents masqueraded as local farmers. Los Angeles simply announced its intentions to appropriate waters that had been flowing, hitherto wasted, into the useless salt lake, with plans to export it for more productive municipal use downstairs.\footnote{Id. at 594–95.} This was the easy part—the water flowing into the lake had never been diverted for a beneficial use cognizable under the doctrine of prior appropriations, so it was, for all legal purposes, available for new claims by the first comer. And that comer just happened to be the city of Los Angeles.

City officials also began acquiring all riparian lands whose owners might someday lay claim to Mono Basin water. They accomplished this mostly by consensual sales, but where there was resistance, they made it known that they would invoke the powers of eminent domain that are statutorily available to California municipalities seeking additional water resources, even extraterritorially.\footnote{See also Andrew H. Sawyer, Changing Landscape and Evolving Law: Lessons From Mono Lake on Making and Taking the Public Trust, 50 ORLA. L. REV. 311, 323–24 (1997).} Ultimately, the city did have to resort to eminent domain to acquire the property from a few local holdouts, and it prevailed in subsequent law suits.\footnote{Id. at 597.}

In this way, Los Angeles was able to acquire most riparian rights in the Mono Basin and assert appropriative claims to the remaining water flowing into Mono Lake.\footnote{See supra note 3, at 596–98.} However, there was one additional obstacle before water could be sent south. Pursuant to California laws not yet in place when Los Angeles began taking water from the Owens Valley, the city also needed the State Water Resources Control Board to sanction the new withdrawals with a permit.\footnote{Ryan, The Historic Saga, supra note 3, at 594–98.} Yet, the Owens Valley tragedy left the state water board genuinely torn about allowing the same situation to take place at Mono Lake. Water board officials had just seen this sad story play out just a few hundred miles to the south. They worried...
openly about the same devastating harms befalling the Mono Basin, and they even memorialized these concerns in their final decision.\textsuperscript{172}

Nevertheless, they granted the permits in full, concluding that under existing California water law, their hands were tied.\textsuperscript{173} They believed that they had no choice but to approve Los Angeles’ requested permits, because the city planned to put unappropriated waters to beneficial use—and municipal use at that, the most privileged category of beneficial use.\textsuperscript{174} The Board read the California Constitution and water statutes to require the facilitation of municipal access to needed water resources as their highest legal obligation.\textsuperscript{175} Accordingly, the Board issued the permits in 1940, although even as it did so, its members enshrined their grave hesitations in writing.\textsuperscript{176}

With all legal approvals in place, the Los Angeles Department of Water and Power (DWP), the agency charged with securing and delivering water to the city, set to work completing the Mono Basin Extension of the Aqueduct. The Aqueduct would eventually extend to farthest reaches of the Mono Basin mountain streams, and then shunt the water through an eleven-mile tunnel underneath the dormant Mono Craters volcanoes that lay between Mono Lake and the upper reaches of the Owens River. Infamously, construction of the Mono Craters tunnel famously cost one man’s life for each mile of tunnel—showing that water was even more valuable than gold in California, worth its weight in human blood.\textsuperscript{177}

Water began to flow south to Los Angeles, and the lake gradually began to decline. As it had for the past three million years, water in the lake continued to evaporate off the surface, leaving dissolved salts behind. However, the fresh water that once flowed down from the mountains to replenish it was now being diverted directly from those mountain creeks into a series of mechanical intakes.\textsuperscript{178} These intakes shepherded Mono Basin water under the Mono Crater volcanoes and into the headwaters of the Owens River, where it was routed into the original apparatus of the Los Angeles Aquifer.

Thirty years later, when continued development in Los Angeles led the city to require still more water supply, DWP realized that there was potential for yet more harvest from the Mono Basin.\textsuperscript{179} Due to capacity limitations of the existing infrastructure, not all available water was being diverted into the Aqueduct; some was still making it into the lake. Accordingly, in the early 1970s, DWP solved this problem by building a second aqueduct—the “Second Barrel” of the Mono Basin Extension.\textsuperscript{180} The Second Barrel was essentially another long tube paralleling the first one.\textsuperscript{181} With it in place, Los Angeles was able to import between 12–20% of its water supply from the Mono Basin, four hundred miles away.\textsuperscript{182}

\subsection*{D. The Impacts of Diversions in the Mono Basin}

Mono Lake had been slowly declining ever since the arrival of the Aqueduct, but when Second Barrel was installed in 1971, the lake began to decline much more quickly.\textsuperscript{183} In 1962, the lake had already lost twenty-five vertical feet from its original elevation before diversions began in the 1940s.\textsuperscript{184} After the Second Barrel went in, the lake lost nearly as much height in half the time. By the time of the litigation that followed in the early 1980s, the lake had lost forty-five vertical feet and half of its entire volume to water exports through the Aqueduct.\textsuperscript{185}

As the lake declined, limestone tufa towers that develop beneath the surface became exposed.\textsuperscript{186} These otherworldly geological structures form at the mouth of underground springs, where calcium-rich fresh water meets the carbonates suspended in the alkaline lake water, precipitating out as calcium carbonate and growing only as high as the water level.\textsuperscript{187} As the lake receded, the decline could be marked by how much tufa had become exposed above the surface. One famous cluster of human-height tufa towers near the north shore became known as the “Benchmark” tufa, because they provided a useful visual benchmark of Mono Lake’s disappearance.\textsuperscript{188} In 1962, when the lake had lost twenty-five vertical feet, the tops of the Benchmark tufa were just beginning to appear over the surface. By 1968, they were exposed at the base, on a tiny island of relicited lakebed near the water’s edge. By 1995, after twenty years of augmented exports through the Second Barrel, they stood a mile from the new shoreline.\textsuperscript{189}

The falling lake level caused formidable air quality problems for the region, as lakebed that had been submerged for millennia became increasingly exposed and airborne.\textsuperscript{190} The bed of Mono Lake is similar to the toxic salt flats exposed after Owens Lake was drained, except that Mono Lake is much more alkaline, as it has been accumulating mineral deposits for exponentially more time. Satellite images from space revealed the emerging bathtub ring of white alkali salt flats as the lake declined,\textsuperscript{191} and the same air quality problems that plague the Owens Valley began to threaten the Mono Basin. Strong winds off the steep Eastern Sierra escarpment

\begin{footnotesize}
\begin{enumerate}
\item Ryan, The Historic Saga, supra note 3, at 595–96.
\item Id.
\item Mono Lake, 658 P.2d at 714.
\item Id.
\item Id. at 71, 714.
\item See Hart, supra note 144, at 43.
\item See Hart, supra note 144, at 43–97.
\item Id.
\item See Hart, supra note 144, at 56–57.
\item Id. at 42–43.
\item Ryan, The Historic Saga, supra note 3, at 590–92.
\item See Hart, supra note 144, at 49, 51; Mono Lake Comm., The Mono Lake Story, https://www.monolake.org/about/story [https://perma.cc/8D88-KHJB].
\item Mono Lake Facts, supra note 144.
\item See Hart, supra note 144, at 50–51.
\item Id.
\item See id.
\item See Hart, supra note 144, at 52–54.
\end{enumerate}
\end{footnotesize}
swayed my decision in the case, as the state argued that it had no public trust duties to Mono Lake, a navigable waterway. But the court disagreed, finding that the state had a duty to protect Mono Lake as a navigable waterway.

In summary, the case of Monolake Comm. v. Superior Court highlights the importance of the public trust doctrine in protecting navigable waterways and the environment. The case is a reminder that our legal system has a role to play in protecting our natural resources and ensuring they are used in a sustainable manner.

II. National Audubon Society v. Superior Court

The case of National Audubon Society v. Superior Court is another example of how the public trust doctrine is used to protect natural resources. In this case, the plaintiffs, the National Audubon Society, sued the state of California to prevent it from diverting water from Mono Lake.

The plaintiffs argued that Mono Lake is a navigable waterway and that the state had a duty to protect it. The court agreed, finding that the state had a public trust duty to protect Mono Lake.

The case of National Audubon Society v. Superior Court is an important reminder that the public trust doctrine is a powerful tool for protecting our natural resources. The case is a testament to the importance of the public trust doctrine and the role of the courts in protecting our natural resources.
The plaintiffs argued that the original 1940 diversion licenses had been granted in violation of the public trust doctrine, because the Water Board had failed to consider the resulting harms to the public trust values it was obliged to protect at Mono Lake. To support their contention, they pointed to the Board’s own written record of its concerns at the time, in which they had wrung their hands about the apparent fact that there was nothing they could do to prevent the Owens Valley tragedy from being repeated at Mono Lake. These writings either demonstrated that they had not considered their obligations under the public trust doctrine, or that if they had considered them, they ignored them. By my analogy, this was like the state of Illinois giving away the bed of Chicago Harbor one hundred years earlier in the Illinois Central case, which the Supreme Court had pointedly affirmed the state could not do.

Los Angeles had a lot at stake, and it ferociously defended the lawsuit. City leaders realized that if they lost, they not only stood to lose up to 20% of their already strained water supplies. In addition, the negative precedent the case might create could threaten their ability to import other critical water supplies from other distant, out-of-basin locations. From their perspective, Los Angeles had complied with both the letter and the spirit of California water law, which has always sought to facilitate municipal access to water resources for beneficial use in urban areas. They were even reluctant to implement the water conservation efforts urged by the Mono Lake advocates and incentivized by offers of state and federal funding. The prior appropriations regime may even have contributed to this decision, because as a “use-it-or-lose-it” system, a user who manages to conserve water risks forfeiture of their rights to use that water in the future.

According to Los Angeles, then, the plaintiffs had it all wrong. The city was hardly violating the public trust doctrine, which protects only navigable waterways, and the city was drawing water not from the hypersaline lake, but Mono’s non-navigable feeder creeks. Moreover, Los Angeles argued, the public trust was the wrong doctrine to focus on. The dispositive law was that of prior appropriations, which the Supreme Court had pointedly affirmed the state could not do. Ryan, The Historic Saga, supra note 3, at 568.

The California Supreme Court issued a memorable opinion that both affirmed and disappointed the central arguments made by both sides. The prior appropriations doctrine, an abrogating act of statutory law, should trump the common-law public trust doctrine, which effectively abrogates any contradictory common law. The two parties deadlocked on the seemingly irreconcilable issue of which rule of law reigns supreme.

B. The Court's Decision

The California Supreme Court issued a memorable opinion that both affirmed and disappointed the central arguments made by both sides. The prior appropriations doctrine did not foreclose the common-law public trust. Instead, it concluded, but neither did the public trust doctrine determine the future of California’s massive and entrenched water works. Solomon-like, the court announced that neither of the two sets of law at issue trumps the other, and that the state must somehow find an accommodation between them. Its most significant holding, that the prior appropriations doctrine did not abrogate California’s public trust, was cause for celebration among the Mono Lake Advocates. But the court declined their invitation to exalt the public trust above all other considerations, holding that the entrenched legal and mechanical infrastructure constructed to move water resources around California could not be wishes away, nor should it. The court observed that the state is dependent on such waterworks, and that it would be “disingenuous” to pretend otherwise. For that reason, it concluded, the law cannot casually dismiss the

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214. Id. at 712–14.
215. Id. at 714.
216. Id. at 712–14. By my analogy, this was like the state of Illinois giving away the bed of Chicago Harbor one hundred years earlier in the Illinois Central case, which the Supreme Court had pointedly affirmed the state could not do. Ryan, The Historic Saga, supra note 3, at 568.
217. Id. at 604.
219. Id. at 602 (2015).
220. Id. See, e.g., Salt River Valley Water User’s Assn. v. Kovacovich, 411 P.2d 201 (Ariz. 1966) (concluding that an irrigator who implemented water conserving technology was not entitled to the conserved water under his appropriative right). Today, most prior appropriation states have amended their water laws to provide greater incentives for water users to conserve and protect against forfeiture. For example, California now entitles those who conserve water to use, sell, or lease conserved water yielded by these efforts. Cal. Water Code § 1011.
221. Mono Lake, 658 P.2d at 716, 727.
223. Id. at 607–08.
226. Id.
227. Id. at 712.
228. Id. at 712, 727.
231. Id. at 712, 727.
232. Id. at 712.
appropriative rights upon which holders, especially major metropolitan areas, have come to rely.\textsuperscript{233} Nevertheless, the court concluded that the public trust doctrine is also the law of the land, and that the state may not ignore the obligations it imposes.\textsuperscript{234} While the doctrine is designed to protect navigable waterways, the court recognized that under circumstances like these, the waterway cannot be meaningfully separated from its non-navigable tributaries.\textsuperscript{235} The court found that the state had clearly failed to consider the public trust implications of the 1940 licensing decision, and since the state cannot neglect its public trust obligations,\textsuperscript{236} it must reconsider these licenses anew, weighing Los Angeles’ legitimate needs for water against the scenic, ecological, and recreational public trust values at stake in the Mono Basin.\textsuperscript{237}

Of note, the court did not provide much guidance about how, exactly, the state should proceed in balancing legitimate but incommensurate interests beyond the admonition that it must. Analytically, it is useful to consider whether the decision creates a mere procedural requirement—a command to think carefully before deciding to compromise trust values, such as the “look before you leap” analysis required by the National Environmental Policy Act of 1969 (NEPA)\textsuperscript{238}; or whether it creates a substantive command to protect public trust values. The procedural requirement is clear, as the decision was premised on the state’s failure to consider public trust obligations at Mono Lake in the original licensing decision. But was there more?

The decision is so understated on this point that it takes a careful reader to find it, but the court did in fact articulate a substantive, if weak, command—to protect public trust values as much as possible.\textsuperscript{239} The court directed that “before state courts and agencies approve water diversions they should consider the effect of such diversions upon interests protected by the public trust, and attempt, so far as feasible, to avoid or minimize any harm to those interests.”\textsuperscript{240} Requiring the state to avoid harming trust values as much as is “feasible” leaves an awful lot to state discretion, but it does imbue a substantive dimension to California’s public trust doctrine that distinguishes it from the purely procedural requirements of NEPA. Such breadth of discretion begs questions about whether the command has real bite, but the court’s language does provide both a moral impetus for state action and a legal hook for public and judicial oversight.

C. The Aftermath: The Water Board’s Decision 1631

After the California Supreme Court’s decision, the Water Resources Control Board spent the next ten years trying to calculate the proper balance between these competing inter-}

\textsuperscript{233} Id.
\textsuperscript{234} Id.
\textsuperscript{235} Id.
\textsuperscript{236} Id.
\textsuperscript{237} Id. at 728–29.
\textsuperscript{238} 42 U.S.C. §§ 4321–4370(h) (2012).
\textsuperscript{239} Mono Lake, 658 P.2d at 728.
\textsuperscript{240} Id. (emphasis added).
For that reason, when the Water Board ruled that the city would have to stop exporting all Mono Basin water until interim benchmarks were met, many perceived the decision not as a compromise between the interests of both sides, but as a serious loss for Los Angeles. The big question on everyone’s mind was whether the city would appeal the Water Board’s decision. That would have brought many more years of litigation, and even more serious environmental impacts for the Mono Basin during the interim. Many observers anticipated that Los Angeles, who had so bitterly fought the underlying litigation, would certainly appeal.

Yet, in a remarkable turnaround, the city changed course. Much like the citizens of Illinois in the Illinois Central story, the good people of Los Angeles voted in new city leadership, and those new leaders took office with a new platform and a new approach: Conservation.

Rather than carrying on the same old battle, the city decided to cooperate with the Mono Basin advocates they’d been fighting in court, resolving to work together toward increased water conservation in the Los Angeles basin and restoration of the deteriorated resources of the Mono Basin. Instead of appealing Decision 1631, they took advantage of the state and federal grants that have been previously offered to implement large-scale water conservation projects. Through a series of programmatic conservation efforts, from facilitating industrial water recycling to subsidizing low flush toilet installation and other household-based limits on consumption, the city made remarkable progress—recovering through conservation alone the entire loss of water supply that had been coming from the Mono Basin. Los Angeles deserves enormous credit for its leadership in water conservation and recycling ever since.

IV. Unpacking the Mono Lake Decision

The Mono Lake case not only saved Mono Lake, it established several important legal principles, interpreting the scope of public trust protections for different values, in application to different resources, and even the operation of the doctrine over time. But before assessing them, I’d like to consider the issue the court resolved that carries the most theoretical heft: the implications of the decision for the legal nature of the public trust doctrine itself.

A. The Nature of the Public Trust Doctrine

As noted, the court concluded that California’s statutorily adopted prior appropriations doctrine did not abrogate its common-law public trust doctrine, and that neither Trumps the other. Both sets of legal requirements must be considered together, and perhaps balanced against one another, when the state makes management decisions about water resources subject to the public trust like Mono Lake. Yet, this grand gesture of legal compromise highlights a singular feature of the public trust doctrine, and how it departs from the usual legal norms. Because at first blush, Los Angeles’s argument on this point seems correct—normally, statutory law does trump the common law.

This seemingly paradoxical result makes sense, however, if the doctrine originated as a constitutive grant of authority and obligation regarding the management of public commons water resources. If the public trust doctrine serves to both grant and limit sovereign authority—granting the sovereign ownership of these resources but obligating it to manage them in trust for the public—then, of course, it would be self-defeating to allow the state to abolish the limit legislatively. Some have argued that this gives the doctrine a quasi-constitutional foundation, an underlying legal constraint that statutory law can build upon but not undermine, which makes it inherently different from more conventional, garden-variety common-law doctrines.

Some have argued that this interpretation of the public trust doctrine is a necessary implication of the equal footing doctrine, which is also recognized as a principle of U.S. constitutional law—even though, like the words “public trust,” the words “equal footing” appear nowhere in the U.S. Constitution.

While many jurisdictions have followed California’s model, it is important to note that at least one American jurisdiction, Idaho, has taken a markedly different approach, prompting both political and scholarly controversy.

258. Id. at 727.
259. Id.
261. Id. at 733–74.
264. U.S. Const. art. IV, § 3, cl. 1. See also Boyle v. Smith, 221 U.S. 559, 566 (1911) (interpreting the equal footing clause in reference to sovereign ownership of submerged lands).
265. See, e.g., Lawrence v. Clark Cnty., 254 P.3d 606, 613 ( Nev. 2011) (“The final underpinning of our formal adoption of the public trust doctrine arises from the inherent limitations on the state’s sovereign power.”); In re Water Use Permit Applications for the Waihahoe Ditch, 9 P.3d 409, 432 ( Haw. 2000) (”[W]hereby and precedent have established the public trust as an inherent attribute of sovereign authority”); East Cape May v. State Dept. of Envtl. Prot., 777 A.2d 1015, 1034 ( N.J. Super. A.D. 2001) (noting that “ tidally-flowed land has always been subject to the public trust doctrine . . . [which] provides that the sovereign never waives its right to regulate the use of public trust property”); Caminiti v. Boyle, 732 P.2d 989, 994 ( Calif. 1987) (“The state can no more convey or grant and limit sovereign authority—granting the sovereign ownership of these resources but obligating it to manage them in trust for the public—then, of course, it would be self-defeating to allow the state to abolish the limit legislatively.”).
the Idaho Supreme Court issued a series of public trust decisions converging on the California Supreme Court’s interpretation in Mono Lake,267 the state legislature enacted a statute that expressly foreclosed this interpretive path.268 The legislature declared that the public trust doctrine did limit the state’s ability to alienate title to the beds of navigable waters, but that it had little impact beyond that,269 preventing the doctrine from impacting the allocation of prior appropriative water rights or state decisions about the commercial, agricultural, or recreational uses of public trust waterways.270

Environmental advocates and scholars condemned the Idaho statute as an illegitimate legislative move,271 but in fairness, that depends on the nature of the doctrine at its core. If the public trust doctrine does include a constitutive limit on sovereign authority over natural resource public commons, then yes, the Idaho Legislature’s move to abrogate this limit was ultra vires. That view is reflected in the California approach, mirrored in other states with strong common-law doctrines, such as Hawaii, New Jersey, and Washington, and those with express constitutional trusts, such as Pennsylvania.272 But the Idaho Legislature treated the doctrine as just another conventional expression of ordinary state authority, which is normally subject to legislative change. The Idaho example poses a strong challenge to the constitutive public trust model, indicating both the variability of the doctrine among U.S. jurisdictions and also this critical underlying theoretical dilemma.

The contest between the California and Idaho models is significant, because it reveals precisely this unresolved theoretical question at the heart of the public trust doctrine. Is it a constitutive element of sovereign authority that cannot be customarily dissolved by the one wielding that sovereign authority at any given moment in time? Or is it an expression of the state’s conventional police power to protect the public welfare, which can always be revisited by future legislative decisionmakers? If we assume that the public trust doctrine in every state evolved from a single, unified principle, then the contrary approaches taken by these states pose a thorny legal problem, because it would seem that they cannot both be right. Either the doctrine originated as a modifiable expression of conventional state authority, or it has always been a less negotiable constraint on sovereign power.273

If California is right, then unlike the conventional common law, the public trust doctrine represents a quasi-constitutional limit on sovereign authority that cannot be so easily legislated away. But if Idaho is right, then the doctrine is just another common-law rule that is forever subject to new sovereign consensus. Neither of these principles can reduce to the other without constitutional change. The Idaho approach could not legitimately evolve from the California model, nor could the California approach evolve from the Idaho model, because either path threatens conventional rule of law principles. At least in the United States, sovereign authority cannot not free itself of constitutional constraints, nor does ordinary common law assume constitutive status through conventional common-law processes.

The disjunction begs the question: which is it? And indeed, debate over the answer continues to unfold in centers of judicial, legislative, and executive decisionmaking across the nation, especially prompted by the unfolding atmospheric trust litigation.274 It demonstrates that the project of interpreting the public trust doctrine remains a work in progress, and we are all bearing witness to this ongoing debate.

B. Doctrinal Extensions on Values, Tributaries, and Time

That statutory water allocation law did not displace the California public trust doctrine may be the most significant part of the holding as a matter of legal theory, but the decision also included several other important extensions of the doctrine, expanding the scope of doctrinal protections to environmental values, non-navigable tributaries, and over time.275

1. Environmental Public Trust Values

The one for which Mono Lake is most often celebrated is the recognition that the public trust doctrine protects not only the navigation and fishing values traditionally associated with the common-law doctrine but also the ecological, scenic, and recreational values at stake at Mono Lake.276 The

267. See, e.g., Selkirk-Priest Basin Ass’n v. State ex rel. Andrus, 127 Idaho 239, 240 (1995) (suggesting that the public trust doctrine might be used to constrain harm from logging activities to an impacted water body); Idaho Conservation League v. State, 911 P.2d 748 (Idaho 1995) (declining intervention by environmental groups to raise public trust issues where state ownership was not in issue, but suggesting in dicta that the public trust doctrine could take precedence over vested water rights). See also Kearney, supra note 266 at 95–96 (discussing the reaction of the legislature to these cases).


269. Id. at § 58-1201(4) and (6) (defines public trust doctrine as guiding alienation of the title of the beds of navigable waters and clarifies that the purpose of the act is to define limits on the public trust doctrine); id. at § 58-1203(1) (limits the public trust doctrine to "solely a limitation on the power of the state to alienate or encumber the title to the beds of navigable waters.").

270. Id. at § 58-1203(3) (does not limit the state to authorize public and private use or alienation of title to the beds of navigable waters if the state board of land commissioners determines that it is in accordance with Idaho statutes and constitution and for the purposes of navigation, commerce, recreation, agriculture, mining, forestry, or other uses).

271. See, e.g., Kearney, supra note 266; Blumm et al., supra note 262.

272. See sources cited supra, notes 87 & 265.

273. If there is one, an alternative explanation would probably require the operation of something like the controversial "Constitutional Moments" higher lawmaking hypothesis offered by Prof. Bruce Ackerman to explain the adoption of constitutional principles outside the formal amendment process (justifying, for example, the canonization of Fourteenth Amendment principles within the U.S. constitutional framework notwithstanding problems with the post-civil war amendment process). BRUCE ACKERMAN, WE THE PEOPLE: FOUNDATIONS 6–7, 110–11 (1991). Ackerman’s theory, of course, has itself been the object of intense criticism. See, e.g., Michael J. Klarman, Review: Constitutional Fact/Constitutional Fiction: A Critique of Bruce Ackerman’s Theory of Constitutional Moments, 44 STANFORD L. REV. 759 (1992).

274. See infra Part IV.

275. For a fuller analysis, see Ryan, The Historic Saga, supra note 3, at 609–12; Ryan, supra note 4, at Chapter VI.

Mono Basin makes a great poster child for this proposition, because it is such a visually stunning place, with a unique and life-productive ecosystem, attracting hundreds of thousands of recreational visitors each year.

In this regard, however, Mono Lake is really just riding the coat-tails of a slightly earlier California case, Marks v. Whitney, in which the California Supreme Court first allowed for consideration of these extended environmental values. Mono Lake was the later comer, relying itself on the precedent set forth in Marks, but Marks was a relatively dry and technical case that adjudicated rights of access to privately-owned tidelands, about which ordinary people could not get terribly excited. Mono Lake has perhaps stolen Marks’s rightful thunder, but the Mono Lake story was so much more engaging that it has come to stand for this legal innovation in the public consciousness more compellingly than Marks was able to do.

2. Non-Navigable Tributaries

Notably, Mono Lake also extended the public trust doctrine to the non-navigable tributaries on which a navigable waterway relies. Spanning 45,000 acres and reaching depths of hundreds of feet, Mono Lake is unquestionably a navigable waterway. It has been commercially navigated since the time of the California Gold Rush, when it was used to transport logs from the Jeffrey Pine forest south of the lake to Bodie, one of the principal Gold Rush boom towns north of the Basin. Yet, Los Angeles was not diverting water directly from Mono Lake, whose salty waters are manifestly non-potable. Water was diverted from the freshwater Mono Basin creeks that flow down from the Sierra Nevada into the lake, and these steep, rocky creeks were not navigable at the point of diversion. Los Angeles attempted to leverage this distinction, but the Court held that the tributaries of a protected waterway must also be protected if the alternative would result in the destruction of the protected waterway.

The extension of public trust protection to non-navigable tributaries at Mono Lake continues to play a pivotal role in the unfolding power of the doctrine to protect California waterways. Most recently, the Mono Lake case proved foundational in a public trust decision extending the non-navigable tributary rule to groundwater. The Scott River in central California is a navigable river substantially fed by groundwater sources, and the river has declined seriously as these sources are increasingly exploited. The plaintiffs in the Scott River case sought to extend the Mono Lake rule to groundwater on exactly the same theory—that even though groundwater tributaries are non-navigable, withdrawals must be limited to protect the navigable waterway that depends on them.

In 2018, the California Court of Appeals affirmed that the state has the authority and obligation under the public trust doctrine to regulate extractions of groundwater that affect public trust uses in the Scott River. The decision was heralded by environmentalists, who have long urged that water law better account for the interdependence of ground and surface water resources. However, it was equally decried by advocates for property rights holders, including the farmers and ranchers who had been withdrawing groundwater that was the subject of this litigation for commercial purposes. Later that year, when the defendant county appealed this decision to the California Supreme Court, the high court denied review, making the Court of Appeal’s decision the final word in the case.

3. Duty of Ongoing Supervision

Finally, and perhaps most concerning to water managers throughout the western United States, the California Supreme Court articulated in Mono Lake a duty of ongoing oversight for public trust resources. Conceptually, this was necessary to overcome the time lag between Los Angeles’ original grant of the diversion licenses in 1940 and the filing of litigation forty years later. Mono Lake was not the first case to apply the doctrine in the context of water rights—it followed a recent North Dakota case requiring consideration of the impacts of a new consumptive permit on existing and future supply—but it was the first to do so retroactively. In the Mono Lake case, the court held that there is no statute of limitations on public trust claims; the state has an ongoing duty to supervise public trust resources and consider its responsibilities under the doctrine. This ongoing obligation of oversight both allowed and required the Water Board to revisit its past decision, when that decision had failed to take account of public trust obligations.

277. 491 P.2d 374, 380, 2 ELR 20049 (Cal. 1971) (expanding public trust protections to ecological, habitat, open space, climatic, and scenic values).
278. See id.
281. Id.
283. Mono Lake, 658 P.2d at 721.
284. Scott River, Case No.: 34-2010-80000583 (Cal. 3d App. Dist., Aug. 29, 2018).
285. Id. at 2.
286. Id.
287. Richard Frank, California Court Finds Public Trust Doctrine Applies to State Groundwater Resources, Legal Planet (Aug. 29, 2018), legal-planet.org/2018/08/29/california-court-finds-public-trust-doctrine-applies-to-state-groundwater-resources/ (reporting that the court declared that “California’s powerful public trust doctrine applies to at least some of the state’s overtaxed groundwater resources . . . [and] rejects the argument that California’s Sustainable Groundwater Management Act displaces the public trust doctrine’s applicability to groundwater resources”).
290. Mono Lake, 658 P.2d at 727.
In terms of practical impact, this might have been the biggest legal innovation of all. By implication, it meant that the state might have to revisit its Mono Lake diversion decision again in another forty years’ time—or sooner than that, or later—as circumstances evolve.\textsuperscript{294} Indeed, it could require the state to revisit any past decision involving a navigable waterway for the same reason, or if circumstances significantly alter the calculus underlying a past decision. At least in theory, all water allocation or management decisions impacting public trust waterways could be up for renegotiation, as would be all future decisions.\textsuperscript{295} The potential ramifications of this duty of ongoing supervision sent shock waves through the arid west, where diverters feared what this could mean for the certainty of their rights and infrastructure.\textsuperscript{296} The prospect of revisiting management decisions made without consideration of public trust values threatened to upend many seemingly settled allocation plans, because before the Mono Lake case called attention to them, public trust issues were unlikely to have been raised during the decisionmaking process.\textsuperscript{297}

This point generated considerable controversy, and indeed, no state has adopted the full Mono Lake doctrine of ongoing oversight\textsuperscript{298} except Hawaii, a riparian rights state that operates under a wholly different set of legal and hydrological constraints.\textsuperscript{299} As noted, some states have gone out of their way to ensure that they do not follow in California’s footsteps, as the Idaho Legislature did in statutorily limiting the judicial evolution of the doctrine.\textsuperscript{300} Outside of the Mono Basin, even California has not made much use of the doctrine retrospectively, although the doctrine does now play an important role in prospective administrative decisionmaking.\textsuperscript{301}

C. Post-Decision Pushback

In the context of the Mono Lake story, it is easy to paint a heroic portrait of the public trust doctrine. After the Mono Lake litigation, the doctrine emerged as a darling of the wider environmentalist community—the unlikely savior of a treasured place against the forces of those with far greater power. Many celebrated the David-and-Goliath result, in which a rag-tag collection of local scientists and bird watchers organized around a kitchen table somehow defeated one of the largest and most powerful cities in the world.\textsuperscript{302} However, not everyone was so enamored with the doctrine. Important critiques soon emerged from advocates for private property rights, advocates for greater separation of powers, and even some environmentalists.\textsuperscript{303}

The most vociferous critique comes from the property rights community. Property rights advocates worry about how quickly the modern public trust doctrine has developed, and the new interests it has been interpreted to protect.\textsuperscript{304} They decry the way they see the doctrine putting a fist on the scale on the side of public interests at the expense of established private interests in water resources protected by the trust.\textsuperscript{305} They are concerned about the trajectory of public trust disputes when the doctrine seems so malleable, encompassing new values as they become recognized—and especially if public trust decisions can be revisited over time through a duty of ongoing oversight.\textsuperscript{306}

Another critique has arisen from those concerned with the legal process ramifications of the public trust doctrine.\textsuperscript{307} These critics worry about the separation of powers implication of a doctrine that allows the judiciary to second-guess legislative and executive decisionmaking.\textsuperscript{308} They view judicial encroachment on policy decisions with skepticism, given that the judiciary is “the least democratic branch,” in comparison with the others that are more directly beholden to electing constituents.\textsuperscript{309} Legal Process critics are troubled by the idea that unelected judges could countermand the popular will, and that even in states where judges are elected, their decisions could maintain precedential value long after a judge leaves office.\textsuperscript{310} To these champions of the political branches, the public trust doctrine seems not only antidemocratic but potentially destabilizing to the rule of law.\textsuperscript{311}

Finally, while most environmentalist love the public trust doctrine, the Mono Lake decision also produced an environmentalist critique, one that I have previously referred to as “The Green Dissent.”\textsuperscript{312} Leading that charge thirty years ago was Richard Lazarus, now a leading professor of environ-

\textsuperscript{294} Ryan, The Historic Saga, supra note 3, at 608.
\textsuperscript{295} Id. at 611–12.
\textsuperscript{296} Id. at 608–11.
\textsuperscript{297} Id. at 609, 611–12.
\textsuperscript{298} Id.
\textsuperscript{299} In re Water Use Permit Applications for the Waiahole Ditch, 9 P3d 409, 445 (Haw. 2000).
\textsuperscript{300} See supra notes 266–71 and accompanying text (discussing Idaho's legislative abrogation of the common-law doctrine).
\textsuperscript{301} See generally David Owen, The Mono Lake Case, the Public Trust Doctrine, and the Administrative State, 45 U.C. Davis L. Rev. 1099 (2012).
\textsuperscript{302} Ryan, The Historic Saga, supra note 3, at 603–09.
\textsuperscript{303} For a fuller analysis, see id. at 617–22; Ryan, supra note 4, at Chapter VII.
\textsuperscript{304} Id. at 615, 618–19; James L. Huffman, A Fish out of Water: The Public Trust Doctrine in a Constitutional Democracy, 19 Envtl. L. 527, 533 (1989) (identifying the doctrine as a creature of property law that has been distorted by the courts beyond its proper boundaries); Barton H. Thompson Jr., The Public Trust Doctrine: A Conservative Reconstruction and Defense, 15 S. Envtl. L.J. 47, 49 (2006) (suggesting reconstruction of the public trust doctrine in response to libertarian and property rights critiques); Lloyd R. Cohen, The Public Trust Doctrine: An Economic Perspective, 29 Cal. W. L. Rev. 239, 274–76 (1992) (criticizing the public trust doctrine’s effects on private property rights); see also Rose, supra note 31, at 711–13, 717; (recognizing the inevitable conflict between the public trust and private property rights and considering what type of property can, under competing notions of public trust, be considered inherently public). But see Richard A. Epstein, The Public Trust Doctrine, 7 Cato J. 411, 428–30 (1987) (analyzing the public trust doctrine from a similarly libertarian, property rights perspective, but supporting it as a natural limitation on government power, comparable to restrictions on eminent domain).
\textsuperscript{305} Ryan, The Historic Saga, supra note 3, at 615, 618–19.
\textsuperscript{306} Id. at 615–19; Thompson, supra note 304, at 47, 48–49.
\textsuperscript{308} Ryan, The Historic Saga, supra note 3, at 618.
\textsuperscript{309} Id.
\textsuperscript{310} See Huffman, supra note 304, at 533.
\textsuperscript{311} Id.
mental law at Harvard Law School. He famously criticized the environmentalist embrace of the doctrine, arguing that it would take the burgeoning environmental law movement—which had come of age barely ten years earlier in the 1970s—in the entirely wrong direction.

Central to the Green Dissent was the position that it was a mistake to embrace the tools and vocabulary of property law to accomplish the stewardship-oriented goals of environmental law. As Lazarus explained, the public trust doctrine emphasizes such property law concepts as public and private ownership of resources, trustees and beneficiaries, and so forth. Instead of infusing environmental law with property concepts, he maintained that environmental law should embrace stewardship concepts more consistent with new environmental statutes such as NEPA and the Clean Air and Water Acts, and the emerging principles of administrative law. The stewardship approach obliges the state to protect valued resource independently from ownership, public or otherwise. After all, if we base environmental protection obligations on public ownership, then what happens if a fickle public suddenly decides it would be more valuable to put up a parking lot?

Accordingly, not everybody loves the public trust doctrine as it stands, nor does everyone cheer where it may be headed. These critiques warrant mention, especially as new developments push the doctrine into territory not previously recognized in U.S. law.

V. The Contested Future: An Atmospheric Trust

After Mono Lake, environmentalist appeals to the doctrine surged, although successes were mostly limited to contexts involving waterways. There have been important new applications in the context of water resources, including California’s extension of the Mono Lake doctrine to groundwater tributaries in the Scott River case, the protection of public beach access in New Jersey, public walking rights along Great Lakes shores, and the protection of public drinking water from hydraulic fracturing under Pennsylvania’s constitutionalized version of the doctrine.

Yet, all along, litigators and scholars have tried to understand the proper extent of the doctrine. Is it a background principle of state law that can function as a defense to takings litigation? If it applies to waterways, then which waterways? All of them, or only some subset? And if it protects waterways as public commons against private monopoly or appropriation, then why not apply the same rule to other critical natural resources that are also susceptible to appropriation or monopoly? Why not to fisheries? Why not to biodiversity? And perhaps most to the point, as we face down the increasingly violent effects of climate change, why not to the atmospheric commons?

Indeed, recall the original Justinian statement of the doctrine that I introduced at the beginning of this Article, which explicitly named “the air” among the select public commons protected by the doctrine, together with the running water, the sea, and the shores.

To that end, University of Oregon Prof. Mary Wood has advocated that the public trust doctrine should apply to the atmosphere. She argues that we should seek public trust protection for the air commons and the climate system bound up with that enables life on earth as we know it. Inspired by her scholarship, environmental advocates have launched the atmospheric trust litigation project, now spearheaded by the nonprofit organization, Our Children’s Trust, which has assisted youth plaintiffs around the country in bringing suits and administrative action seeking public trust protection for the atmosphere. The named plaintiff in the most important of these cases, Juliana v. United States, was a teenager when she and eighteen other youth plaintiffs first filed the case in 2015.

313. See, e.g., Lazarus, supra note 312, at 715–16.
314. Id.
316. Lazarus, supra note 312, at 648–649.
318. Id.
320. See supra notes 284–88.
323. See Dernbach, supra note 88, at 464; see also Ryan, The Historic Saga, supra note 3, at 624.
324. See supra notes 75–79 and accompanying text, discussing the use of the doctrine as a defense to takings claims.
325. See supra notes 88, 90, and accompanying text, discussing the use of the doctrine as a defense to takings claims.
327. See J. Inst. Premiun, 2.1.1., supra note 16; see also supra Section I.A.1.
329. Id.
331. Our Mission, OUR CHILDREN’S TRUST, https://www.ourchildrenstrust.org/mission-statement [https://perma.cc/BWP7-KK8H]: Our Children’s Trust elevates the voice of youth to secure the legal right to a stable climate and healthy atmosphere for the benefit of all present and future generations. . . . We lead a game-changing legal campaign seeking systemic, science-based emissions reductions and climate recovery policy at all levels of government. We give young people, those with most at stake in the climate crisis, a voice to favorably impact our futures.
333. 217 F. Supp. 3d 1224, 46 ELR 20072 (D. Or. 2016). Together with other public trust scholars, I have participated in the professor amicus briefs on the side of the plaintiffs in this case.
The plaintiffs in these cases maintain that the government holds the air commons in trust for the people, just as it does navigable waterways—and that both federal and state governments are failing their trust obligations to protect it from polluters, who are wrongfully using the atmosphere as a carbon sink. More importantly, they say, the atmospheric commons is a congestible resource that is being used up. The specific public trust argument is that by not regulating greenhouse gas pollution, the federal and state governments are allowing private appropriators to appropriate the air commons as a private dumping ground, and at the expense of the public interest for future generations in a livable world. The fact that the youth plaintiffs are, themselves, members of the future generation makes their claim all the more arresting.

Juliana had been slated for trial before Judge Ann Aiken of the Federal District of Oregon in October of 2018, having defeated several motions to dismiss. However, the case was stalled after the Donald Trump Administration filed multiple petitions for the writ of mandamus, a rare judicial remedy by which the Administration sought to convince a higher court to force Judge Aiken to reverse herself and dismiss the case. Two of these petitions were appealed unsuccessfully to the Supreme Court, but the latter received noteworthy attention in the order denying it.

The Court once again declined the petition, but the order included language suggesting this was because relief might still be available from a preferable judicial forum, the Ninth Circuit. Despite her previous decision to allow the case to go forward, Judge Aiken acknowledged the Supreme Court’s implied suggestion by certifying the question of whether the trial should proceed to the Ninth Circuit on interlocutory appeal. As this piece goes to press, the trial is once again on hold. After hearing arguments on the motion to dismiss in early June 2019, the Ninth Circuit is now deliberating whether to allow the case to go to trial.

Juliana has generated enormous interest, but the case faces high legal hurdles. First, the plaintiffs must convince the federal judiciary that the obligations of the public trust apply to the federal government, which is best positioned to regulate greenhouse gas pollution in the United States. In fact, the Supreme Court recently issued dicta emphasizing that the doctrine is strictly a matter of state law, which will be a challenge for the plaintiffs. Nevertheless, the plaintiffs seek to distinguish this dicta based on its context, and emphasize that if the public trust doctrine is an attribute of sovereign authority, then it must be an attribute of all sovereign authority, and not just that at the state level. In addition, states beyond the original thirteen colonies that inherited the public trust doctrine as an attribute of sovereignty upon statehood must have received it through the sovereignty conferred by the federal government, suggesting a further basis for a federal trust obligation.

Perhaps more importantly, the plaintiffs must convince the court that the public trust doctrine should apply to atmospheric resources, which would represent a substantial extension of the doctrine as it has been thus far understood in the United States. Judge Aiken initially sustained the claim against a motion to dismiss on this ground, sidestepping the atmospheric trust issue by holding that the plaintiffs had also alleged cognizable claims of harm to coastal resources that are clearly protected by the public trust doctrine. However, the Juliana plaintiffs have bolstered this element of their lawsuit by adding an ambitious substantive due process claim for violation of their fundamental right to a livable climate, implicating both the Due Process Clause of the Fourteenth

334. Id. at 1233, 1253.
335. Id. at 1233, 1245; see also Ryan et al., Debating Juliana, supra note 330 (Wood on government responsibility for climate change); see also Ryan, The Historic Saga, supra note 3, at 625–31 (discussing the atmospheric trust project before the filing of Juliana v. United States, which corrected some of the strategic issues in the first batch of cases).
340. Id.
341. The Court’s order implied that the Ninth Circuit had previously dismissed the government’s efforts to dismiss the case for reasons that may no longer be valid: At this time . . . the Government’s petition for a writ of mandamus does not have a “fair prospect” of success in this Court because adequate relief may be available in the United States Court of Appeals for the Ninth Circuit. . . . Although the Ninth Circuit has twice denied the Government’s request for mandamus relief, it did so without prejudice. And the court’s basis for denying relief rested, in large part, on the early stage of the litigation, the likelihood that plaintiffs’ claims would narrow as the case progressed, and the possibility of attaining relief through ordinary dispositive motions. Those reasons are, to a large extent, no longer pertinent. The 50-day trial was scheduled to begin on October 29, 2018, and is being held in abeyance only because of the current administrative stay.
347. See Ryan et al., Debating Juliana, supra note 330 (presenting Rick Frank’s argument that Court’s passing statement in the PPL Montana dicta cannot resolve the latest issue in a fully different factual context).
348. See Juliana v. United States, 217 F. Supp. 3d 1224, 46 ELR 20072 (D. Or. 2016); see also supra Part IVA. (discussing the public trust doctrine as a constraint on sovereignty); Ryan, The Historic Saga, supra note 3, at 575–77 (discussing scholarly interpretations of the public trust doctrine as an attribute of sovereignty).
Amendment and the doctrine of unenumerated fundamental rights under the Ninth Amendment.\footnote{351}

In her dramatic ruling on the defendant’s motion to dismiss, Judge Aiken originally held that the plaintiffs could move forward with their suit, concluding that there was a substantive due process right to a climate system capable of sustaining human life.\footnote{352} Analogizing to the fundamental right to marry that the Supreme Court had recognized earlier the same year,\footnote{353} Judge Aiken opined:

“[A]s to [the idea is that certain rights may be necessary to enable the exercise of other rights, whether enumerated or unenumerated. . . . Exercising my ‘reasoned judgment,’ I have no doubt that the right to a climate system capable of sustaining human life is fundamental to a free and ordered society. Just as marriage is the ‘foundation of the family,’ a stable climate system is quite literally the foundation of society, without which there would be neither civilization nor progress.”\footnote{354}

Importantly, Judge Aiken did not conclude that the plaintiffs’ rights had actually been violated in this case, only that they would have the opportunity to try and prove that violation in court. Even if the plaintiffs prevail at the district court level, the odds are stacked against them on appeal, especially if the case reaches the Supreme Court.\footnote{355} Nevertheless, the recognition of a fundamental right to climate security would be a landmark ruling for the federal bench, if it is not extinguished by a contrary decision by the Ninth Circuit in the summer of 2019.

On top of everything else, the case raises difficult questions of remedy: if the plaintiffs actually prevail, what can they realistically expect a court to do to vindicate their claim?\footnote{356} Courts ordinarily do not order legislative or executive action. But these plaintiffs argue that climate change, and what they allege as the government’s complicity in creating it, is no ordinary circumstance.\footnote{357} In addressing the issue of redressability to achieve standing to bring their suit, the plaintiffs persuaded at least Judge Aiken that they had framed a violation of their rights that was the proper subject of judicial review,\footnote{358} and that the defendant agencies possessed the power to redress their claim, using existing regulatory resources, by developing a remedial plan to reduce greenhouse gas emissions.\footnote{359}

Juliana is not the first legal action premised on the atmospheric trust, nor will it be the last.\footnote{360} Parallel atmospheric trust cases have been unfolding throughout the nation at the state and federal levels, with incremental judicial success\footnote{361} and some noteworthy success through administrative process.\footnote{362} One atmospheric trust petition successfully forced the creation of an executive climate action plan in Massachusetts.\footnote{363} Atmospheric trust cases are also being brought in other countries, including Uganda and India,\footnote{364} inspired not only by Juliana but by the 2015 Urgenda Foundation v. Netherlands climate lawsuit that, citing a sovereign obligation to protect the environment, required the Dutch government to reduce greenhouse gas emissions by 25%.\footnote{365}

351. Id.; see also Blumm & Wood, supra note 262, at 71–72.
353. The early judicial cases show a mix of failures and incremental successes. Many were dismissed on displacement, preemption, or political question grounds. E.g., Alex L. v. Jackson, 863 F. Supp. 2d 11, 15, 42 ELR 20115 (D.D.C. 2012) (inter alia, dismissing ATL federal suit on the basis of displacement by Clean Air Act); Chernaik v. Kitzhaber, 328 P.3d 799, 808 (Or. Ct. App. 2014) (reversing lower court’s dismissal based on the political question doctrine, separation-of-powers doctrine, sovereign immunity, and the court’s perceived lack of authority to grant requested relief).
It will be fascinating to see how Juliana and the other atmospheric trust claims unfold. Many have speculated that these cases simply reach too far from established legal norms, and that they will inevitably fail as they progress through legal channels toward the Supreme Court, even if they succeed at trial or on appeal to the Ninth Circuit. The claims implicate each of the critiques raised after the Mono Lake case: property rights advocates worry about the ever-expanding doctrine that eats all in its path, environmental critics worry about the bad precedent that losses along the way might create for more promising avenues of regulating greenhouse gases, and legal process critics worry about the separation of powers implications of the requested remedy.

Nevertheless, the Juliana case recalls of one of the most powerful features of the public trust doctrine, one that implicates the separation of powers controversy, but with a twist. It is the way that the doctrine enables citizens to use the levers made available by the horizontal separation of powers to increase their efficacy in democratic participation, by invoking judicial review of legislative or executive action that violates legal rules. This is a feature of our democratic design, hallowed in the United States since Marbury v. Madison. The Juliana plaintiffs may not succeed in their lawsuit, but the very act of bringing it, and generating so much public support for their claim, puts pressure on the political branches in ways that amplify their voices as individual voters and constituents.

For example, the Juliana case has generated grassroots support from over 36,000 individual young people, each of whom signed on to an open amicus brief supporting the plaintiffs’ claims, and the list of supporters continues to grow. The children’s brief, as it has become known, begins:

Children are people and citizens. The Constitution protects the fundamental rights of children as fully as it does the rights of adults. The Constitution states clearly it intends to “secure the Blessings of Liberty to ourselves and our Posterity.” We are the Posterity the Constitution protects. Scientific studies show that government actions today, including its actions of authorizing greenhouse gas discharges and subsidizing fossil fuel extraction, development, consumption, and exportation, imperil plaintiffs’ constitutional rights to life, liberty, and property. The government’s fossil fuel policies and actions threaten to push our climate system over tipping points into catastrophe. We ask the Court to grant plaintiffs the opportunity to try their case and prove the harms caused and intensified by governmental action.

On the matter of the atmospheric trust, the brief continues:

As the Constitution protects our fundamental rights, the Public Trust Principle protects our inheritance of resources. It articulates the legal duty of the government, as the trustee of property held in common, to conserve our vital natural resources. The government holds and manages the public trust for us, the trust beneficiaries. The government is obligated to protect our inheritance of, and refrain from substantially impairing and alienating, the natural resources upon which all life and liberty depend. “The beneficiaries of the public trust are not just present generations but those to come.”

Widespread attention generated by cases like Juliana and Urgenda, together with other focal points of youth activism, including the leadership of Swedish teenager Greta Thunberg, have inspired a growing chorus of youth climate protests worldwide, including the International Climate Strike on March 15, 2019, in which young people from every inhabited continent marched out of school to protest their governments’ failures to respond to the increasing urgency of scientific climate predictions. Even if Juliana is dismissed by the Ninth Circuit, the case has helped coalesce a youth movement that no motion to dismiss can undo.

Indeed, the atmospheric trust cases reveal that “the separation of powers” is not the same thing as those powers working in complete isolation. Citizens’ appeal to the judicial process is rightly part of the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process. The ability to seek judicial review is especially important when citizens have felt silenced within the wider political process.

Viewed this way, it is not that the judiciary is antidermocratically second-guessing the political branches—the sec-

366. E.g., Ryan et al., Debating Juliana, supra note 330 (Huffman critiquing the claims on these grounds).
368. 5 U.S. (1 Cranch) 137 (1803) (establishing the principle that courts may strike down government actions that violate constitutional rules).
370. Brief of Amicus Curiae Zero Hour on Behalf of Approximately 32,340 Children and Young People in Support of Youthful Appellants, Juliana v. United States, 217 F. Supp. 3d 1224, 46 ELR 20072 (D. Or. 2016), https://www.joinjuliana.org/joinjuliana_files/201931FinalYoungPeoplesBrief.pdf (last visited Apr. 10, 2019); see also Zero Hour Movement, Join the Youth Legal Action for a Safe Climate, https://www.joinjuliana.org (https://perma.cc/EV8Y-3ENT) (noting that the brief was filed with over 36,000 names in support, and inviting continued signatories while the case works its anticipated way toward the Supreme Court).
374. Ryan et al., Debating Juliana, supra note 330 (Ryan opening statement).
376. See supra notes 60–82 and accompanying text, discussing the Illinois Central
ond-guessing at issue is by citizens legitimately invoking their rights to the judicial process. And especially for the Juliana plaintiffs and supporters, many of whom are too young to vote, it is one of their only means of democratic participation.

Viewed this way, the role of judicial review within the political process is a gambit of good governance. We would not want every disgruntled voter to make a federal case out of every grievance, and to that end, the rules of standing generally operate to screen out those with least merit. But the gambit succeeds if the claim is legitimate enough to withstand procedural barriers, and compelling enough to motivate public support within the wider political process. In the ongoing and recursive dialectic between law and culture, a compelling case can sometimes change the conversation, even if it does not immediately change the law. For another example, consider the evolution of the Supreme Court’s gay rights jurisprudence over the last thirty years—a stunning progression that tracked the evolution of cultural norms, themselves influenced by compelling examples of civil rights litigation.378

Juliana and the other atmospheric trust cases may yet prove a successful gambit for the plaintiffs, even if they fail to prevail in the judicial process. The children bringing these suits have generated unusual public support and international interest.379 Something about their argument has struck a chord with many ordinary people, motivating greater interest in the efficacity of good climate governance to protect the atmospheric commons on which we all depend. The Juliana public trust claim reaches them in the same way the Mono Lake case reached ordinary people who never mustered excitement about the important public trust legal developments in Marks.380 And indeed, this is how our political process, incorporating all three branches of government, is supposed to work. As in all complex policy dilemmas, the procedural mechanics of governance are reinforced by political safeguards.381

**Conclusion: Navigating Public and Private Interests in Natural Resource Commons**

The public trust doctrine has long played a critical role in helping us navigate the protection of public and private interests that collide in natural resource commons. All public resource commons are complicated by the demands that individuals place on their share of a common pool. Sometimes, the common pool is more easily disaggregated, as when one individual takes a quantity of water from a waterway, or a single member from a species of biodiversity. Other times, it may be harder to disaggregate commons values, as when one individual erects a weir preventing all else from navigating the waterway, or in the climate context, where one polluter’s use of the atmosphere as a carbon sink equally compromises everyone else’s share. But in all cases, over-exploitation of the commons by some individuals can compromise the resource for all—or in the worst case, destroy it.

The public trust doctrine represents one of the earliest known mechanisms for regulating natural resource commons problems. It first did so by recognizing these resources as public commons, belonging to everyone equally, as set forth in ancient Roman law.382 Later, it added recognition of the sovereign authority to maintain these resources for the public, as affirmed by early British383 and American law.384 More recently, it has been understood to confer sovereign responsibility to affirmatively protect these resources for the public, as recognized by the Mono Lake case and its progeny.385

As the California Supreme Court recognized in Mono Lake, the doctrine does not foresee private use of public commons. The Mono Lake case affirmed a variety of legitimate private uses of the water commons at issue there—recreational use, scientific inquiry, commercial exploitation, and sheer aesthetic beauty, among others—so long as these private uses did not compromise the sustainability of the underlying res, the thing held in trust. For example, the public trust doctrine did not prevent the state’s decision to allocate Mono Basin water for municipal use in Los Angeles—so long as doing so did not destroy the public trust values at Mono Lake. The Scott River case does not forbid all groundwater extraction in the basis, so long as public trust values in the river are maintained. The Juliana plaintiffs are seeking a climate action plan that balances legitimate needs for economic development against fundamental rights to climate security. But the Mono Lake case and its progeny leave much to resolve in interpreting the role of the public trust doctrine in protecting resource commons going forward.

Each of these cases raise the question: to what resources should the doctrine apply? Mono Lake applied the doctrine squarely within the traditional public trust purview of navigable waterways—but the case extended the protections of the doctrine to new environmental values, farther up the watershed, and farther out in time. The Scott River followed directly from Mono Lake, applying the new doctrine protecting non-navigable tributaries of a dependent navigable waterway—but it extended that rationale to the new context of groundwater management. The Scott River decision is satisfying to water scholars who critique groundwater law as long hampered by scientifically uninformed legal doctrines that artificially separate hydrologically intertwined ground and surface waters—yet it threatens settled expectations created by the old legal regime. Meanwhile, the Juliana case takes the same public trust rationale—sovereign obligation to protect a critical public commons from private misappropriation—and applies it in a wholly new context. The idea

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379. See, e.g., Wernick, supra note 338.

380. 491 F.2d 374, 380, 2 ELR 20049 (Cal. 1971) (expanding public trust protections to ecological, habitat, open space, climatic, and scenic values).


382. See supra Part I.A.1.


385. See supra Part III–IV.
of treating the atmosphere as a public commons is as old as Justinian, but applying the public trust doctrine to protect it is a relatively new idea.

Next, who should administer the public trust? A defining feature of the common-law doctrine is that it empowers ordinary citizens to seek redress for public trust violations in court. Separation-of-powers critics worry that the doctrine thereby overpowers the judiciary, enabling it to override legisliative policymaking. Yet, this critique may be overblown, not only because it discounts the way that judicial review further empowers democratic participation, but also because traditionally the law of trusts has always been interpreted and enforced by courts. If the trust analogy holds, then who better than judges to oversee the public beneficiary’s interest in trust resources against self-serving or neglectful management by the legislative trustee? The government is always under a duty to protect the public; it is the veritable purpose of government, and the charge underlying the police power from which it generally operates. But while government decisions under the police power get a lot of judicial discretion, some public trust obligations are less open to interpretation. Courts may be the best venue for evaluating government decisions that may transgress the acceptable margins of interpretation.

Finally, what is the nature of the constraint, and to what authority does it apply? These are, perhaps, the most interesting and difficult questions raised by the Mono Lake case and its progeny. The Mono Lake case established the nature of the trust as something beyond the ken of ordinary common law, without fully resolving the question of its constitutive status. As discussed in Part IV, the extent to which the common-law doctrine exceeds conventional common-law limitations remains debated, although most states that have addressed the matter follow the California approach of placing it beyond the reach of ordinary statutory abrogation. This approach seems most consistent with a doctrine that meaningfully constrains sovereign authority over public trust resources—limiting what the sovereign can and cannot do—because a constraint that the sovereign can easily extinguish has no real force.

As for whose sovereign authority it constrains—state or federal or both—the most theoretically and historically consistent answer is that it constrains all sovereign authority. There is no doubt that the doctrine constrains the states, based on centuries of U.S. case law. But if it is appropriately understood as a limit on sovereign authority over public commons, then as an intellectual matter, it should not matter whose sovereign authority is at issue—it constrains whatever authority governs the relevant commons. This answer also best accounts for the history of state and federal turn-taking on managing public trust resources, given that most states inherited their trust-impressed resources through the intervening medium of federal sovereign authority, by which the U.S. government held these resources until they could be disbursed to new states.386 The Supreme Court's dicta in PPL Montana characterizing the doctrine as a feature of state law is definitely problematic for claims that depend on a federal trust—but that passing, out-of-context reference should not be authoritative when the Court properly considers this issue for the first time.387 As it may well do in the next few years, if the Juliana case or a related claim makes it to the High Court.

In the meantime, the state and lower courts—and increasingly, legislative and executive actors—will continue to shepherd the protection of public trust values in the separate but interlocking roles within the political processes of good governance. The doctrine will continue to help us navigate the inevitable clash between public and private interests in natural resource commons, a clash that is destined to intensify with the increasing pressure we are putting on public commons resources like air, water, biodiversity, and climate—and perhaps other commons the law has yet to address. So long as the doctrine is functioning, under whatever operative legal theory, we can all take comfort in the knowledge that critical public commons will have a legal sentry and safeguard.

386. See Ryan, ‘The Historic Saga, supra note 3, at 573–74: [T] he public trust doctrine must constrain federal authority, because the implicit trust obligations of most states arose by delegation of federal authority over lands previously held in federal ownership. . . . [O]ther than the original thirteen colonies, all states inherited their trust obligations through the medium of federal sovereignty that applied before their lands were carved out of federal holdings. The states must have inherited a pre-existing trust obligation . . . because there is no clear legal moment when new trust obligations were expressly conferred. Therefore, the doctrine must have implicitly inhered at the federal level before it was delegated to the states, and by this theory, it remains there in application to all trust resources that were not delegated to the states.

387. See Ryan et al., Debating Juliana, supra note 330 (Frank discussing the PPL Montana dicta).